Supreme Court, U.S.
FILED
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NO. 91-1509

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC.
EDWARD ACUNA SR., AND MARGARET
ACUNA,

Petitioners

vs.

BAY AREA BANK & TRUST,

Respondent

ON APPEAL FROM THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ROBERT L. MAYS JR
8049 Midcrown Drive
Suite 200
San Antonio, TX 78218
(512) 657-7772
TBN:13308200
Counsel of Record
for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court violate the Seventh Amendment to the U.S. Constitution by denying a trial by jury by granting summary judgment to Defendant BANK when Defendant's motion for summary judgment failed to address all causes of action of the Plaintiff?

2. Did the District Court violate the Seventh Amendment to the U.S. Constitution guaranteeing right to trial by jury of a U.S. citizen of Hispanic ancestry by granting a summary judgment when fact issues existed?

3. Is the determination of fact issues by the District Court in order to grant a summary judgment a denial of due process, trial by jury and equal protection rights, a violation of the 5th, 7th and 14th Amendments, when a jury demand has been made?

4. May the BANK ignore the requirements of the Code of Federal Regulations concerning the U.S. Small Business Administration and an S.B.A. guaranteed loan?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the United States District Court were:

The Honorable Lynn Hughes,
U.S. District Judge for the Southern District of Texas;

United States of America,
Small Business Administration, Plaintiff;

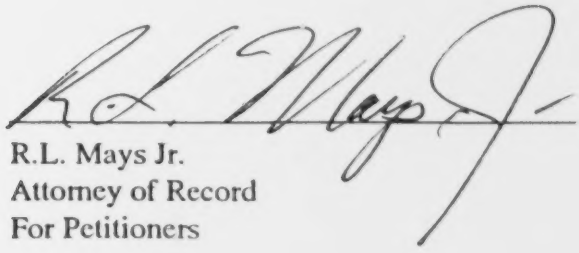
William A. Wirth,
Special Assistant U.S. Attorney,
Counsel for Plaintiff;

Gulf Coast Helicopters, Inc.,
Edward Acuna, Sr. and Margaret Acuna,
Petitioners;

R.L. Mays, Jr.,
Counsel for Petitioners,

Bay Area Bank & Trust,
Respondent; and

Charles M. Jordan,
Counsel for Respondent.



R.L. Mays Jr.
Attorney of Record
For Petitioners

DESIGNATION OF CORPORATE RELATIONSHIP

GULF COAST HELICOPTERS, INC., filing this Petition for Writ of Certiorari as Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

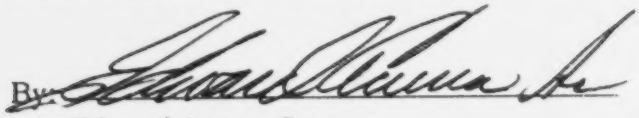
GULF COAST HELICOPTERS, INC. is not owned by any parent corporation.

GULF COAST HELICOPTERS, INC. does not have an ownership interest in any subsidiaries.

GULF COAST HELICOPTERS, INC. does not have any affiliates.

DATED: March 14, 1992

GULF COAST HELICOPTERS, INC.

By: 

Edward Acuna, Sr.

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is unreported, and is set forth in the Appendix herein [See Appendix B]. The denial of the petition for a writ of certiorari in the companion case (No. 91-667) is set forth in Appendix C.

OPINION DATE:
The judgment sought to be reviewed is dated December 23, 1991, and was a per curiam opinion rendered by the U.S. Court of Appeals for the Fifth Circuit.

JURISDICTION STATEMENT:
The opinion of the Fifth Circuit Court of Appeals was entered on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254, and pursuant to Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS AND STATUTES:

The constitutional provisions and statutes involved in the case are:

Amendment V to The U.S. Constitution
[See Appendix D]

Amendment VII to The U.S. Constitution
[See Appendix E]

Amendment XIV to The U.S. Constitution
[See Appendix F]

15 U.S.C.S., Section 631
[See Appendix G]:

15 U.S.C.S., Section 636
[See Appendix H]:

13 C.F.R., Section 101.1 et. seq.
[See Appendix I]

STATEMENT OF THE CASE

In 1980, GULF COAST HELICOPTERS, INC. ("GULF COAST") borrowed One Hundred Fifty Thousand Dollars ($150,000.00) (the "loan") from BAY AREA BANK & TRUST (the "BANK") in Webster, Texas, to buy a helicopter [See Appendix J]. The loan was guaranteed by the U.S. Small Business Administration (the "SBA"). Mr. and Mrs. Edward Acuna, Sr. (the "ACUNAS") were personal guarantors for GULF COAST, as they had been for prior loans with the BANK.

GULF COAST made monthly payments of $2,730.30 on the variable rate loan for the seven (7) year term of the loan [See Appendix J and Appendix L]. There was no balloon provision in the note [See Appendix M]. At the end of seven years, the BANK informed GULF COAST that a balloon payment of $39,081.00 was due [See Appendix N] in violation of the SBA standard operating procedures [See Appendix FF]; GULF COAST and the ACUNAS refused to make the balloon payment because (1) they denied owing any additional amount, and (2) they had never before been required to make a balloon payment on any of five (5) prior notes with the BANK.

The ACUNAS denied owing any additional amount because, with one exception [See Appendix Q], neither GULF COAST nor the ACUNAS were given notice of interest rate changes "within the first ten days of each calendar quarter" (a mandatory note provision) [See Appendix J and Appendix P]. GULF COAST and the ACUNAS contend that the note was actually paid because (1) they had paid every monthly payment amount sent to them by the BANK; (2) those payments were on time and were actually $ .30 more than the specified payment amount in the note, and (3) they were not given the notice required to "activate" a higher interest rate.

GULF COAST and the ACUNAS received only one Interest Rate Change Notice [See Appendix Q]. At the summary judgment hearing, GULF COAST provided the affidavit of its expert witness that, including the one Interest Rate Change Notice, the $150,000.00 debt had not only been paid, but actually had been overpaid by $1,239.15 [See Appendix R]. It is undisputed that GULF COAST paid $229,345.20 [See Appendix S]; the dispute concerns the interest component of those payments.

The payments of GULF COAST were due on the seventeenth (17th) of each month. GULF COAST was mailed monthly payment reminders [See Appendix T] approximately one (1) week [See

Appendix U] before each payment was due. The reminder reflected the note amount, loan, date, interest rate and required monthly payment. The reminders were returned to the BANK each month together with a check for the loan payment.

The BANK incorrectly administered the loan during the seven year term as follows:

(1) The BANK failed to notify GULF COAST and/or the ACUNAS of the purported Interest Rate Changes, which was a mandatory provision of the note [See Appendix J and Appendix V]; (2) The BANK failed to collect interest during the first sixty (60) days of the loan [See Appendix I and Appendix Y], a violation of 13 C.F.R., Section 119.31(b) which states: "SBA shall not be obligated to purchase the guaranteed percentage unless SBA shall first determine that any failure by lender to provide timely and accurate quarterly status information caused no substantial harm to the Government"; (3) The BANK failed to notify the SBA of purported Interest Rate Changes [See Appendix X], a violation of 13 C.F.R., Section 122.21; after institution of this suit, BANK began sending PRIME CHANGE NOTICES [See Appendix BB]; (4) The BANK failed to ensure the loan amortized, resulting in the purported balloon payment due [See Appendix Y and Appendix N], a violation of 13 C.F.R., Section 120.3(b)(iii)(B), [now 13 C.F.R., Section 122.8-4(g)]; (5) The SBA failed to investigate the BANK's administration of the loan prior to the purchase of its guaranteed portion [See Appendix W], a violation of 13 C.F.R., Section 122.10(a)(6)(i), [now 13 C.F.R., Section 120.202-1]; (6) The BANK failed to release the lien on GULF COAST's land when the loan using it for security was paid [See Appendix Z] in 1988, a violation of 13 C.F.R., Section 122.20(c)(2)(vii). The District Court ruled that GULF COAST and the ACUNAS lacked standing to complain of the loan administration, that only the SBA could raise the loan administration issue [See Appendix AA, Page A-52], and that, in effect, the SBA elected to waive the issue by its purchase of the loan from the BANK by payment of its ninety (90%) percent guaranty to the BANK.

Several fact issues remain, thereby precluding summary judgment, concerning whether or not the routine monthly payment reminders [See Appendix T] (received by GULF COAST after the 10th) were sufficient to constitute the required Interest Rate Change Notice [See Appendix BB] clearly "Appendix BB" and "Appendix T" are not the same. The District Judge, the Honorable Lynn Hughes, made that affirmative determination when he found the notice to be commercially sufficient [See Appendix AA, Page A-48].

Not addressed in the BANK's motion for summary judgment were issues concerning the $78,000.00 loan on GULF COAST's land [Appendix Z] and overreaching by the BANK, which complaints by GULF COAST arose after the filing of the Original Petition. At the hearing on the motion for summary judgment, Judge Hughes granted Plaintiff's motion to add these matters to Plaintiff's petition and then granted summary judgment to the BANK, without the issues even being addressed by the Court or by BANK in its Motion for Summary Judgment.

REVIEW OF JUDGMENT

Review of the Judgment of the U.S. Court of Appeals for the Fifth Circuit is sought: It affirmed the decision of the U.S. District Court which Petitioner had appealed pursuant to 28 U.S.C., Section 1291.

GULF COAST had demanded a jury trial. GULF COAST may not be denied its right to trial by jury when fact issues exist at the hearing on a motion for summary judgment and the notice issue, overreaching and the failure to release the lien on the $78,000.00 loan were factual determinations. Similarly, the issues concerning loan administration, and the BANK violations of the CFRs regulating the SBA, are entitled to be determined by a jury. GULF COAST respectfully demands its due process, trial by jury and equal protection rights as provided by the 5th, 7th and 14th Amendments to the U.S. Constitution.

REASONS TO ALLOW THE WRIT

The U.S. Supreme Court should grant Writ of Certiorari in this case because of "Exhibits J" and "Exhibits K" in the "Appendix". Each document controls the loans for thousands of individuals and businesses totalling millions of dollars. It is important and necessary to have a uniform national interpretation of the notice requirements for SBA guaranteed loans. Pre-1987 loans [See Appendix J] would utilize Mr. Acuna's loan documents; post-1987 loans [See Appendix K] have the no notice provision. It is equally important that a threshold review level be established for SBA guaranteed loans when improper loan administration issues arise.

Petitioner believes writ of certiorari should be granted because the Court of Appeals [5th Circuit] has so far departed from the accepted

and usual course of judicial proceedings and sanctioned such a departure by a lower court [the U.S. District Court] as to call for an exercise of the Court's power of supervision.

The granting of a summary judgment on causes of action not even addressed in Defendant BANK's motion is clearly improper.

The intrepretation of the standard SBA loan document should not only be settled by this Court but, in light of the "no notice" revisions made since the inception of this suit, should be closely scrutinized for fairness and reasonableness.

CASE HISTORY OF LITIGATION

The original complaint was filed by the UNITED STATES OF AMERICA (Small Business Administration) (the "USA") on August 10, 1988. The original Defendants, GULF COAST HELICOPTERS, INC. ("GULF COAST"), EDWARD ACUNA SR., and MARGARET ACUNA (the "ACUNAS"), filed an answer on September 6, 1988. The Defendants then filed a "Third-Party Complaint" against BAY AREA BANK AND TRUST (the "BANK") on September 9, 1988. Various other pleadings and other discovery materials were filed by the parties. All parties filed motions for Summary Judgment. On August 17, 1990, a hearing on the motions for Summary Judgment was held before Judge Hughes, at which Judge Hughes stated that he would grant Summary Judgment for the USA.

On August 30, 1990, Judge Hughes granted the original Appellee, the USA, Summary Judgment, ordering that the USA shall recover from the original Defendants Forty-One Thousand Seven Hundred Seventy-Nine Dollars and 19/100 ($41,779.19), plus post-judgment interest at 7.88% and costs. This Judgment was final and severed from the case. The original Defendants filed a "Notice of Appeal" from the Final Judgment on September 10, 1990. On September 6, 1990, the USA filed a motion to amend the Final Judgment. An "Amended Final Judgment" was entered on September 26, 1990, ordering that the USA (SBA) recover from the original Defendants Fifty-One Thousand Five Hundred Forty-Six Dollars and 75/100 ($51,546.75), plus post-judgment interest at 7.88% per annum and costs of court. This Judgment was final. Defendants GULF COAST filed a "Notice of Appeal" from the Amended Final Judgment on October 15, 1990.

GULF COAST filed a "Motion to Consolidate" the two appeals pending in the Fifth Circuit. That "Motion to Consolidate" was denied on May 29, 1991.

On June 5, 1991, the U.S. Court of Appeals for the Fifth Circuit in Cause No. 90-2408 affirmed the Summary Judgment in favor of the UNITED STATES OF AMERICA (the "SBA") against GULF COAST, and the ACUNAS. Stay of the Mandate was granted August 6, 1991; Stay of Mandate lifted on approximately September 6, 1991; the judgment was paid October 1, 1991. On October 21, 1991, Application for Writ of Certiorari was filed with the U.S. Supreme Court. That application was denied on January 27, 1992. [See Appendix C].

On May 2, 1991, Judge Hughes granted a Summary Judgment in favor of BANK against GULF COAST. That Judgment was amended on May 9, 1991. GULF COAST, Petitioners herein, filed a "Notice of Appeal" on May 20, 1991. On December 23, 1991, the U.S. Court of Appeals Fifth Circuit in Cause No. 91-2496 affirmed the summary judgment in favor of the BANK against Gulf Coast and the Acunas.

CASE HISTORY FACTUAL

The $150,000.00 Promissory Note called for a fluctuating rate of interest per calendar quarter based on a percentage per annum, equal to the interest rate to which the rate in the Note is pegged (the minimum prime lending rate) at large United States money center commercial banks as published in the Money Rate Section of the Wall Street Journal, plus 2-1/4 percentage points, with the change in the rate of interest to be determined and to become effective as of the first day of each calendar quarter. According to the terms of the Note, the BANK was required to give written notice to the SBA and to GULF COAST of each increase or decrease in the interest rate within ten (10) days after the effective date of the change. GULF COAST received only one (1) such notice, on or about January 1, 1985, of an interest rate increase to thirteen percent (13%) per annum.

The Note also provided that the "Lender has the right to raise or lower the monthly payment to assure such payment will amortize the Note within the bounds of the stated maturity."

The BANK sent GULF COAST payment reminders every month for the seven-year duration of the Note. These monthly notices, which were sent one week before payment was due (the 17th of each month), indicated the total payment due, the date the Note was executed, the Note number, the interest rate, the per diem interest rate after due date, the due date, and the loan balance. These Notices were returned to the BANK with each payment.

Each month for the seven-year length of the loan from September 17, 1980, through August 17, 1987, GULF COAST made payments

to the BANK of $2,730.30, the amount the Notices sent by the BANK showed due. GULF COAST and the Guarantors, the ACUNAS, depended upon the loan being fully amortized at the end of the seven-year period and contacted the BANK, as well as the SBA, on several occasions during that seven-year period in order to determine the status of the loan. The Guarantors were told that the loan was being taken care of, that there was nothing for them to be concerned with, and that whatever was going on between the BANK and the SBA was none of their business. As admitted by the BANK, GULF COAST paid Two Hundred Twenty-Nine Thousand Three Hundred Forty-Five Dollars and 20/100 ($229,345.20) in principal and interest. [Appendix S]

At the end of the seven-year term in July of 1987, the BANK notified GULF COAST that a balloon payment was due on the loan and demanded payment in the amount of Thirty-Nine Thousand Eighty-One Dollars ($39,081.00) in alleged principal (over and above the $229,345.20 already paid). GULF COAST refused this demand. The SBA then paid the BANK ninety (90%) percent of the balance alleged to be owed and was assigned all remaining amounts allegedly due on the Note, as well as the BANK's security interest in one of GULF COAST's helicopters. The USA then filed suit against GULF COAST to recover the purported deficiency.

At the hearing on August 17, 1990, on the motions for Summary Judgment, Judge Hughes stated that he would grant Summary Judgment for the original Plaintiff, the USA. Judge Hughes later granted GULF COAST's motion to supplement its Third-Party Petition against the BANK, but then granted BANK's motion for Summary Judgment, without having the BANK even address the issues raised in the Supplement to its Original Petition [See A-52], without further briefs and without oral argument. Judge Hughes found it "inescapable" that the monthly Notices sent to GULF COAST by the BANK "were sufficient under the terms of the Note to be notices of change of interest rate". [See Appendix AA at A-48]. Judge Hughes found that it did not make any difference that the Notices received were not "interest rate adjustment notice[s]". Id. According to Judge Hughes, the monthly Notices were adequate because they indicated the interest rate being charged. [See A-49]. Despite arguments by GULF COAST's counsel pertaining to assurances and representations by the BANK that the loan would be amortized over the seven-year term of the Note, Judge Hughes found that the Notices sent were commercially sufficient and that GULF COAST was liable for the balance due as alleged in the original complaint. [See A-53]. This is despite the fact that the express terms of the Note required written notice to GULF COAST of the

interest rate adjustment within the first ten (10) days of the beginning of each calendar quarter.

Because the issues concerning the $78,000.00 land loan had arisen after the filing of the original lawsuit, discovery was not even complete concerning (a) usury, (b) overreaching by the BANK for failure to release the lien on the land until approximately fifteen months after it was paid off by GULF COAST. Despite these issues the Court granted the Amended Final Judgment.

QUESTIONS PRESENTED FOR REVIEW
NUMBER ONE

How can the Court grant a summary judgment to BANK when BANK's motion for summary judgment failed to address all of Plaintiff's causes of action, and itself only asked for a partial summary judgment?

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses and to avoid delays of trial in absence of genuine issue of fact, and the rule is not intended to deprive litigants of their rights to a full hearing on the merits of any real fact issue. In re Price's Estate, 375 S.W. 2d 900 (Tex. 1964) A movant may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding; rather, he must establish his entitlement to a summary judgment on issues expressly presented to trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law. Chessher v. Southwestern Bell Telephone Co., 658 S.W.2d 563 (Texas 1983).

By the improper grant of Summary Judgment, the District Court denied the Petitioners equal protection and due process of law. Due process requires that the parties be given a full and fair opportunity to be heard.

The Summary Judgment denied Petitioners their right to jury trial concerning a question of fact. The denial is a violation of Petitioner's Seventh and Fourteenth Amendment Rights under the U.S. Constitution.

It is well settled that Summary Judgment is appropriate only if "there is no genuine issue as to any material fact and ....the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fuchs v. Lifetime Doors, Inc., 717 F. Supp. 465, 466 (W.D. Tex. 1989). The party seeking Summary Judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact

in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982). In determining whether the movant has met its burden, the District Court must view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing Summary Judgment. Washington v. Allstate Insurance Co., 901 F.2d 1281, 1286 (5th Cir. 1990); Fuchs v. Lifetime Doors, Inc., supra. And, in order for Summary Judgment to be granted, the facts and inferences must point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict. Powers v. Nassau Development Corp., 753 F.2d 457, 462 (5th Cir.), clarified, 756 F.2d 1084 (5th Cir. 1985).

All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. Fuchs v. Lifetime Doors, Inc., supra; See, Jones v. Western Geophysical Co. of America, 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant Summary Judgment, the court is merely determining whether a factual dispute exists and is not required to solve those disputes. Fuchs v. Lifetime Doors, Inc., supra. The fact that it appears to the court that the non-movant party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant Summary Judgment. Id.; See, Jones v. Western Geophysical Co. of America, supra. In reviewing the Summary Judgment, the Appellate Court applies the same standard of review as did the District Court. Washington v. Allstate Insurance Co., supra.

Summary Judgment is a potent weapon and an extreme remedy, and the courts must be mindful of its aims and targets and beware of overkill in its use. Findeisen v. North East Independent School District, 749 F.2d 234 (5th Cir. 1984), cert. denied, 471 U.S. 1125 (1985); See, Portis v. Folk Construction Co., 694 F.2d 520 (8th Cir. 1982). The court should not act other than with caution in granting Summary Judgment and may deny Summary Judgment where there is reason to believe that the better course would be to proceed to a full trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Courts should be particularly circumspect where, as here, the case is scheduled for trial by jury. Findeisen v. North East Independent School District, supra.

QUESTIONS PRESENTED FOR REVIEW
NUMBERS TWO AND THREE

Can trial by jury be denied GULF COAST?

The $150,000.00 Promissory Note the parties was ambiguous, particularly as to the terms pertaining to the requirement of notice of the change in interest rates and the amount of the monthly payments and whether or not a balloon payment was required by GULF COAST, or whether the loan must amortize within the seven (7) year term of the Note. These terms are reasonably susceptible to more than one interpretation and were construed differently by the parties. Interpretation is always a question of fact. Summary Judgment is improper where the meaning of a contract is unclear, as is the case here. Therefore, the District Court erred in granting Summary Judgment for the BANK. Summary Judgment as to the meaning of a contract term may not be granted when the term's meaning is not clear or is reasonably susceptible to more than one interpretation. Record Club of America v. United Artists Records, 890 F.2d 1264 (2d Cir. 1989). "Where contract language is ambiguous, the differing interpretations of the contract presents a triable issue of fact. Summary Judgment is therefore inappropriate." Id. at 1270-71. The amount in dispute exceeded $20.00.

Under Texas law, a contract must be analyzed in light of all the surrounding circumstances. Hanssen v. Quantas Airways, Ltd., 904 F.2d 267 (5th Cir. 1990). A contract is ambiguous when it is reasonably susceptible to more than one meaning, in the light of the surrounding circumstances and after applying established rules of construction. Richard Plantation Co. v. Justiss-Mears Oil Co., 671 F.2d 154, 156 (5th Cir. 1982) (citing Texas cases); Watkins v. Petro-Search, Inc., 689 F.2d 537, 538 (5th Cir. 1982). Once a contract is found to be ambiguous, the determination of the parties' intent is a question of fact. Id. As stated in Zell Insurance Agency, Inc. v. Guaranty Security Insurance Co., 399 F.2d 147, 149 (5th Cir. 1968), "[i]nterpretation is always a question of fact" (quoting Dobson v. Masonite Corp., 359 F.2d 921, 923 (5th Cir. 1966)). Indeed, the admission of the SBA [See Appendix L] that "the loan was intended or required to be fully amortized during its seven-year term" is in complete agreement with GULF COAST's position. This is contrary to the decision of Judge Hughes.

Before deciding the "legal effect" of a contract, the court must allow the fact finder to determine its meaning. Id. GULF COAST has the right to have a jury decide its facts, and that right is being denied. An argument between parties about the meaning of a contract is typically

an argument about a material fact, namely, the factual meaning of the contract. Boston Five Cent Savings Bank v. Secretary of Department of Housing & Urban Development, 768 F.2d 5 (1st Cir. 1985). Thus, if the Court determines that the contract is unclear, ordinarily Summary Judgment is improper as differing views of intent will raise genuine issues of material fact. United States v. Sacramento Municipal Utility District, 652 F.2d 1341 (9th Cir. 1981); Freeman v. Continental Gin Co., 381 F.2d 459 (5th Cir. 1967).

This is exactly the situation presented in this case. At issue is the meaning of the contract. The contract is ambiguous, thus precluding Summary Judgment.

At the crux of the matter is the construction of the Note's notice provision concerning changes in the interest rate. GULF COAST contends that under the terms of the Note and the surrounding circumstances, including prior cause of conduct and representations made by the BANK to GULF COAST, that notice of interest rate changes was a condition precedent to a change of the interest rate. GULF COAST further contends that the monthly notices sent by the BANK did not satisfy the interest rate changed notice provision of the Note.

The BANK, however, contends that the rate change notices were not conditions precedent, but were independent promises not affecting GULF COAST's liability for rate changes. Furthermore, the BANK contends that the monthly payment notices served the same function as the rate change notices and, thus, the BANK fulfilled its obligation under the Note.

These differing views stem from the ambiguity in the notice provision, among others, in light of the surrounding circumstances. As the subsequent argument and authority demonstrates, there is ample support for GULF COAST's construction of the notice provision. At the very least, it is evident that the notice provision is reasonably susceptible to more than one interpretation, thus presenting a triable issue of fact and thereby precluding Summary Judgment.

Should the Court find the Note provisions to be unambiguous, then Summary Judgment is similarly precluded. When the language is plain, it must be enforced as written. Republic Nat'l Life Ins. Co. v. Spillars, 368 S.W. 2d 92, 92 (Tex. 1963). The Court has no authority to revise a contract while professing to construe it. General Am. Indem. v. Pepper, 161 Tex. 263, 265, 339 S.W.2d 660, 661 (1960).

Reciprocal promises in a contract are presumed in the absence of an intention to the contrary to be mutually dependent, resulting in the general proposition that a breach by one party will excuse the performance of the other. Morgan v. Singley, 560 S.W.2d 746 (Tex.

Civ. App.—Texarkana 1977, no writ). It is well established that only a "material" breach of a contract provision by one party will justify nonperformance by the other party. Sahadi v. Continental Illinois National Bank & Trust Co., 706 F.2d 193 (7th Cir. 1983). Moreover, the determination of "materiality" is a complicated question of fact, involving an inquiry into such matters as whether the breach worked to defeat the bargained-for objective of the parties or caused disproportionate prejudice to the non-breaching party, whether custom or usage considers such a breach to be material, and whether the allowance of reciprocal nonperformance by the non-breaching party will result in the non-breaching party's accrual of an unreasonable or unfair advantage. Id. All of these issues must be resolved with reference to the intent of the parties as evidenced in large part by the full circumstances of the transaction, thus making these issues especially unsuited to resolution by Summary Judgment. Id.

When a contract provides for a particular form of notice, compliance with such provisions is a condition precedent to invoking the contract rights which are conditioned on the notice. Emerald Forest Utility District v. Simonsen Construction Co., 679 S.W.2d 51 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); Handelman v. Handelman, 608 S.W.2d 298 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). In this case, the Note provided for a particular form of notice for changes in the interest rate. The BANK failed to comply with this provision. The monthly notices that were sent could not substitute for and satisfy the foregoing notice provision. Although the interest rate was indicated in these notices, there was nothing to indicate when a change occurred. Moreover, the notices were not sent within 10 days after the effective date of the rate change as required by the Note. Rather, the notices were sent about seven days prior to the date the monthly payments were due. Clearly, at the very least, these circumstances raise a genuine issue of fact whether the monthly notices satisfied the mandatory notice provision in the Note.

For example, in United States v. Marietta Manufacturing Co., 53 F.R.D. 390 (S.D. W. Va. 1971), at issue was whether a particular letter from the Acting Maritime Administrator constituted the required notice of default as contemplated by the contract. In finding that Summary Judgment on this issue was inappropriate, the court stated as follows:

> Acting Maritime Administrator, did, in fact, on September 15, 1964, notify Marietta that it was in default due to its failure to prosecute the contract work with such diligence and in such manner as would enable it to complete the work in accordance

> with the contract delivery dates. As contemplated by the provisions of Article 29 of the General Provisions of the contract, Mr. Gulick did inform Marietta that it had 15 days from the date of the receipt of the letter in which to remedy the conditions which the Administrator cited as having resulted in a default. Defendants have advanced several rather complex theories under which they assert that the letter of September 15, 1964, was not, and could not have been, a notice of default as contemplated by the provisions of Article 29. Whether or not these arguments are persuasive is irrelevant for the purposes of this decision. It might be argued that the letter of September 15, 1964, which, from all outward appearances would seem to be a notice of default as contemplated by Article 29, was not intended to serve as such notice. In the event that it should be determined this letter was a notice of default, it might then be argued that conduct on the part of the government constituted a waiver of such notice. In either event, however, the decision on these issues will involve the resolution not only of questions of law, but also questions of fact, and thus precludes granting the Defendants' motion for Summary Judgment.

Id. at 395 (emphasis added); see E.C. Ernst, Inc. v. General Motors Corp., 482 F.2d 1047 (5th Cir. 1973) (material issues of fact as to whether instructions given to the subcontractor at the first progress meeting modified the contractual reporting procedures and responsibilities and whether the subcontractor complied with the notice provisions of the contract in connection with claims against the general contractor and owners for additional costs precluded Summary Judgment); Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3d Cir. 1951) (whether notice given by the Defendant was reasonable notice of the failure of the equipment and conformed to the Uniform Sales Act was one of the facts placed in issue by the Defendant's answer and counterclaim; plaintiff's motion for Summary Judgment should not have been granted and to do so was erroneous.

The Summary Judgment denied Petitioners their right to jury trial concerning a question of fact. The denial is a violation of Petitioner's Seventh Amendment Right under the U.S. Constitution.

Also supporting GULF COAST's construction of the notice provision and making Summary Judgment particularly inappropriate are those representations made by the BANK to GULF COAST pertaining to amortization of the loan, the provision in the Note stating that the lender had the right to change the monthly payment to assure such payment would amortize the Note within seven years, no

representation nor notice to GULF COAST of a balloon payment provision, 13 C.F.R., Section 120.3(b)(iii)(B), the notice setting forth the monthly payment due which was sent by the BANK each month to GULF COAST, and the prior course of dealing between the BANK and GULF COAST. The BANK was paid $229,345.20 and still demanded more.

Mr. Acuna testified in his deposition that he had received loans from the BANK on numerous other occasions and repaid them without incident (See Appendix DD at pp. 29, 86). With those loans, he had always paid the amount directed by the BANK in its notice to him and the loans were fully amortized within the terms of the Notes (Id.).

Edward Acuna also testified in his deposition that during the term of the loan he talked with a representative of the BANK, Mr. Quartermont, and asked whether his payment should go up or down if the interest rate went up or down (Id. at 68-69). Acuna was told not to worry about it; in the end it would all be paid (Id.). [See Appendix A-71]

Mr. Acuna further testified that his wife made the payments on the loans, although he might have glanced at the notices received and the amount of the payment due [See Appendix DD at A-72).

In her deposition, Margaret Acuna testified that when the monthly notices arrived she merely looked at the amount due and paid it (See Appendix EE at A-75). She did not really pay attention to the interest rate indicated, but trusted the BANK and "expected them to adjust the payments just like they do on our house" (Id.).

This conclusion is further supported by the Affidavit of John Huston [See Appendix R], who stated that it is possible for interest rates to go up and down during the term of the loan so that a level installment payment throughout the term of a variable rate loan would completely amortize the loan.

An instructive case is Sahadi v. Continental Illinois National Bank & Trust Co., supra, which involved an action by a bank to recover damages for breach of a loan agreement. The Trial Court had granted partial Summary Judgment in favor of the Defendant. On appeal, the court reversed, holding that there existed a genuine factual dispute at least as to the question of whether there was a material breach of the agreement.

The defendant bank in Sahadi had called due the loan to the plaintiffs after the interest payment on the loan was made several hours late. In reversing the grant of Summary Judgment, the court observed that the need for a complete factual inquiry into the underlying circumstances and commercial custom was especially acute where, as in the case before it, the purportedly breaching party claims that time

was not of the essence of the contract. The court observed that asking whether a provision is a "condition" is similar to stating the "materiality" question: both seek to determine whether its performance was a sine qua non of the contract's fulfillment. [T]hat determination may not be made through a mechanical process." 706 F.2d at 198.

Turning to the facts in the case before it, the court noted among other things, that the BANK had previously accepted late payments in its course of dealing with the Defendant, and stated that, whether or not such facts would be sufficient to prove non- materiality in light of all the other evidence adduced at trial, "they at least raise a genuine issue" as to the question of materiality. Id. at 197.

Referring to the BANK's argument that the contract at issue presented an "uniquely attractive case" for the rigid and summary application of time requirements because it contained a specific provision allowing the cessation of the BANK's forbearance if interest were not paid on or before a certain date, the Court stated that the argument merely assumed what it sought to prove: "that the payment of interest on precisely the named date was an essential part of that specific provision, and that whether the precise day of payment was essential can be determined without the benefit of a full inquiry at trial." The Court "spurned such conclusory logic." Id.

Moreover, the Court stated that even if the payment of interest by the named date could summarily be construed as a necessary condition, the District Court would still be required to conduct a full-ranging factual inquiry into whether that condition had been "materially" breached or whether the technical breach was without "pecuniary significance." Id. at 199. "At either level of the 'promise/ condition' analysis, then, Summary Judgment would not be appropriate in this case." Id.

Also instructive is Record Club of America v. United Artists Records, supra, in which the Court reversed a grant of Summary Judgment, finding it inappropriate on the issue of whether the record club had breached its agreement with the record company by failing to make certain payments on a quarterly basis where there were two plausible interpretations as to the required timing for the payments. The Court stated that although the District Court termed one of the interpretation "improbable," it was not entitled to exclude that possibility as a matter of law. 890 F.2d at 1271. "The question of which of the two plausible interpretations should be credited was a question of fact and could not properly be decided on Summary Judgment." Id.

As in the foregoing cases, the District Court in this case erred by

granting Summary Judgment. The District Court did not simply determine whether a factual dispute existed. Rather, it resolved those disputes and decided that GULF COAST's construction of the contract was improbable and that GULF COAST was unlikely to prevail at trial. This was improper. See Fuchs v. Lifetime Doors, Inc., supra; Jones v. Western Geophysical Co. of America, supra; Record Club of America v. United Artists Records, supra; See, also, Potomac Valve & Fitting Co. v. Crawford Fitting, 829 F.2d 1280 (4th Cir. 1987) (a Summary Judgment hearing is not the appropriate forum for assessing the relative weight of conflicting evidence).

The grant of Summary Judgment for the Plaintiff in this case was not only improper, it also denied the Petitioners due process of law.

The Fifth Amendment to the U.S. Constitution commands the federal government: "no person shall . . . be deprived of life, liberty, or property without due process of law. . . ." Due process guarantees that there is a fair decision making process before official action is taken which directly impairs a person's life, liberty, or property, and, where necessary to prevent a miscarriage of justice, an appellant may urge as a ground for reversal, a theory which was not presented in the trial court. Hormel v. Helvering, 312 U.S. 552 (1941); Complaint of Bankers Trust Co., 752 F.2d 874 (3d Cir. 1984); See, A.L.T. Corp. v. Small Business Administration, 801 F.2d 1451 (5th Cir. 1986) (state court judgment reached without due process is void and may be collaterally attacked in federal court); Hardy v. Johns-Mansville Sales Corp., 681 F.2d 334 (5th Cir. 1982) (the right to a full and fair opportunity to litigate an issue is protected by the due process clause).

Due process mandates that a judicial proceeding gives all parties an opportunity to be heard on the critical and decisive allegations which go to the core of the parties' claim or defense and to present evidence on contested facts. Complaint of Bankers Trust Co., supra; See, Jackson v. DeSoto Parish School Board, 585 F.2d 726, 730 (5th Cir. 1978); Thompson v. Madison County Board of Education, 476 F.2d 676, 678 (5th Cir. 1973).

As the court held in Thompson v. Madison County Board of Education, supra:

> Due process mandates that a judicial proceeding give the affected parties an opportunity to be heard on the allegations asserted in the complaint and to present evidence and argument on the contested facts and legal issues framed by the answer to the complaint. Before a district court adjudges, it must determine the facts for itself on the basis of the proffered evidence. . . . In short, a court can only render a judgment after

the parties have been afforded a full and fair trial on the claims properly before the court.

476 F.2d at 678.

In a case involving a state court judge's declaration of a moratorium on the issuance of writs of restitution for a certain period of time, the court in Morrison v. Lipscomb, 877 F.2d 463, 467-68 (6th Cir. 1989), stated:

> It is a prime tenet of our American political philosophy that government has a responsibility to protect the lives, liberties, and property of its citizens, and part of that responsibility includes the provision of courts where individual citizens can seek the vindication of their rights. Morrison has the right to go to court to recover his property; it is not a privilege that can be granted or denied him at the government's whim. It is the right to vindicate one's rights in court that is the heart of the constitutional right to due process of law. This principle is expressed in one of the original sources of the theory of constitutionalism, the Magna Carta. Section 40 of that document states that among the duties government owes to its subjects is that "To no one will we sell, to no one will we refuse or delay, right or justice." This principle is also expressed in the Supreme Court's holding that the due process clause of the fourteenth amendment prevents states from "denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'"

(Footnotes and citations omitted.)

The judge in this case did not give the Petitioners a fair opportunity to be heard on the allegations at issue. As the transcript of the Summary Judgment hearing demonstrates, the judge had his mind made up from the beginning. For example, the judge began the hearing by stating:

> THE COURT: Well, I went all through this and, Mr. Mays, I find it inescapable that the notices your client received in terms of payment due notices—I don't even remember what the bank called them, but the payment notices that revealed the interest rates and payment due, were sufficient under the terms of the Note to be notices of changes of interest rate
>
> . . . .

> It's I think fairly obvious that he accepted that form of notification, since it had the information, and not complained until the end, that he probably waived any defect, even if it extended any—he should have complained the first time they adjusted the interest rate without the appropriate 10 day—isn't it ten days?

[See Appendix AA at p. A-48 (emphasis added).]

When counsel for the Petitioners contended that the BANK failed to comply with the terms of the Note, the judge replied: "That I get to decide". [See Appendix AA at A-49]

After further comments by the judge demonstrating his obvious desire to dispose of this matter by Summary Judgment, the Court, speaking to counsel for the BANK, stated:

> Very well. Mr. Jordan, if you will see that a motion for Summary Judgment and perhaps one for sanctions is filed so we can get this case closed.

[See Appendix AA at p. A-59.]

As these examples illustrate, the judge was anxious to dispose of this matter on Summary Judgment, without regard to the merits of the case.

While a purpose of Summary Judgment is the efficient use of overcrowded judicial resources, See, United States v. Feinstein, 717 F. Supp. 1552 (S.D. Fla. 1989), it cannot be used inappropriately because of a serious backlog of cases in the court system. See, Cowgill v. Zimmerman, 667 F. Supp. 1083 (E.D. Pa. 1987), aff'd, 845 F.2d 1010 (3d Cir. 1988) (backlog of criminal cases in the court system, while a serious problem, does not justify depriving an accused of his Sixth Amendment right to a speedy trial); Robertson v. White, 635 F. Supp. 851 (W.D. Ark. 1986) (Summary Judgment should be cautiously invoked so that no person will be improperly deprived of his Seventh Amendment right to a jury trial); SRI International v. Matsushita Electronics Corp. of America, 775 F.2d 1107 (Fed. Cir. 1985) (although speedy and inexpensive, Summary Judgment is nonetheless a lethal weapon capable of overkill); United States v. Feinstein, supra (similar; and noting that Summary Judgment should not be granted unless the moving party has established his right to judgment beyond controversy). Thus, while the Federal Court for the Southern District of Texas may have a serious problem of a backlog of cases, even more

so than other districts, that cannot be used to justify the inappropriate grant of Summary Judgment.

The Petitioners were not given a fair and full opportunity to litigate this matter. The failure of the Trial Court to accord the Petitioners their equal protection and due process right to a full and fair opportunity to present their claims and defenses requires that the Court's judgment be reversed and the case remanded for trial. See, Complaint of Bankers Trust Co., supra (at virtually every stage of the proceedings, the District Court's rulings inhibited Mrs. Chatterjee's ability to substantiate her allegations of fraud and forgery; she was erroneously deprived of her property interest by virtue of the district court's rulings; in this regard, she was denied the procedural fairness that the Fifth Amendment assures to all persons who, whether intentionally or by the vicissitudes of fate, find their lives, liberty, or property in the hands of the courts; accordingly, the court vacated the order of the district court and remanded for the taking of testimony); Jackson v. DeSoto Parrish School Board, supra (the court's failure to require the plaintiffs to elucidate their legal position (and to the extent it required factual support, to present evidence concerning it), and to afford an adversary opportunity to the School Board, required that the court vacate its order and remand for an appropriate hearing on the issues raised by plaintiff's complaint).

Furthermore, this Court should order that this case be remanded for trial to a different judge. Parties have a right to have their case heard by a neutral and impartial judge. United States v. Lulac, 793 F.2d 636 (5th Cir. 1986); Kern v. Levolor Lorentzen, Inc., 899 F.2d 772 (9th Cir. 1990). 28 U.S.C. Section 455(a) requires a judge to stand recused "in any proceeding in which his impartiality might reasonably be questioned." The standard for recusal is an objective one, that if a reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. In re Continental Airlines Corp., 901 F.2d 1259, 1262 (5th Cir. 1990). Moreover, the due process clause requires a judge to step aside when a reasonable judge would find it necessary to do so. United States v. Crouch, 896 F.2d 78 (5th Cir. 1990).

As the foregoing argument and transcript of the Summary Judgment hearing demonstrates, the Trial judge below was not impartial. He prejudged the case and the Hispanic American who appeared before him seeking justice; he decided to dispose of the case in summary fashion, despite the existence of issues of material fact. Therefore, the judge below should be disqualified and the case remanded

for trial to a different judge. See, In re Continental Airlines Corp., supra (because the goal of the recusal statute, 28 U.S.C. Section 455(a), is to exact the appearance of impartiality, recusal may be mandated even though no actual prejudice exists).

The Court erroneously determined that a genuine issue of material fact does not exist for trial. Smith v. Xerox Corp., 866 F.2d 135 (5th Cir. 1989); Fed. R. Civ. P. 56(c). A genuine issue of material fact does exist and was erroneously decided as follows:

Judge Lynn Hughes in District Court, Southern District of Texas, made a factual finding, See Appendix AA at page A-48 as follows:

> "...[P]ayment notices that revealed the interest rates and payment (sic) due were sufficient under the terms of the Note to be notices of changes of interest rate."

and further on Page A-53, Judge Hughes stated:

> "His [GULF COAST] best defense is that he didn't receive the notices for which the Note provided, but I have found the notices he received to be commercially sufficient and so he needs to pay the rest of the Note."

QUESTION PRESENTED FOR REVIEW
NUMBER FOUR

May the BANK ignore the requirements of the Code of Federal Regulations (C.F.R.s) concerning an S.B.A. guaranteed loan?

The BANK did ignore the requirements as follows:

(1) The BANK failed to notify GULF COAST and/or the ACUNAS of the purported Interest Rate Changes, which was a mandatory provision of the note [See Appendix J and Appendix V]; (2) The BANK failed to collect interest during the first sixty (60) days of the loan [See Appendix I and Appendix Y], a violation of 13 C.F.R., Section 119.31(b) which states: "SBA shall not be obligated to purchase the guaranteed percentage unless SBA shall first determine that any failure by lender to provide timely and accurate quarterly status information caused no substantial harm to the Government"; (3) The BANK failed to notify the SBA of purported Interest Rate Changes [See Appendix X], a violation of 13 C.F.R., Section 122.21; after institution of this suit, BANK began sending PRIME CHANGE NO-

TICES [See Appendix BB]; (4) The BANK failed to ensure the loan amortized, resulting in the purported balloon payment due [See Appendix Y and Appendix N], a violation of 13 C.F.R., Section 120.3(b)(iii)(B) [See Appendix I] as well as SBA SOPs [See Appendix FF], [now 13 C.F.R., Section 122.8-4(g)]; (5) The SBA failed to investigate the BANK's administration of the loan prior to the purchase of its guaranteed portion [See Appendix W], a violation of 13 C.F.R., Section 122.10(a)(6)(i), [now 13 C.F.R., Section 120.202-1]; (6) The BANK failed to release the lien on GULF COAST's land when the loan using it for security was paid [See Appendix Z] in 1988, a violation of 13 C.F.R., Section 122.20(c)(2)(vii). The BANK argues that these and the deviation from providing the required quarterly notice within the first ten (10) days of each calendar quarter was not a substantial breach of contract, or in the alternative, the untimely monthly Note notices caused there to be no breach. The following facts belie a possible construction of these breaches as "insubstantial."

(a) It is admitted [See Appendix L] that the July 17, 1980 Note provides that "Holder [BANK] shall give written notice to the SBA and the undersigned [GULF COAST] of each increase or decease in the interest rate within ten days after the effective date of the change." [Emphasis added]

(b) It is admitted that "the loan was intended or required by the SBA to be fully amortized during its seven-year term." [See Appendix L]

(c) The BANK states [See Appendix S] that GULF COAST paid $229,345.20 on the Note with an original principal balance of $150,000.00.

The Ninth Circuit in First Interstate Bank of Idaho v. Small Business Administration, 868 F.2d 340, (1989) argued that it is appropriate to apply general federal law. U.S. v. Kimbell Foods, Inc., 440 U.S. 715, 726, 99 Sup. Ct. 1448, 1457, 59 L.Ed.2d, 711 (1979); Eastern Ill. Trust and Savings Bank v. Sanders, 826 F.2d 615, 616 (7th Cir. 1987). A party may rescind a contract in case of substantial breach by the other party. See, Eastern Ill. Trust, 826 F.2d at 616-17; CBS, Inc. v. Merrick, 716 F.2d 1292, 1296 (9th Cir. 1983)(Applying New York law). The test of materiality for a federal contract is an all- the-circumstances test. U.S. v. Baus, 834 F.2d 1114, 1125 (1st Cir. 1987); Eastern Ill. Trust, 826 F.2d at 617; cf. Restatement (Second) of Contracts, Section 241 (1979) [hereinafter the "Restatement"]. The facts of this case approach the level of prima facia breach of the loan agreement. First Interstate Bank v. Small Bus. Adm., supra. The BANK failed to give GULF COAST the required quarterly notices with

one exception. [See Appendix W and Appendix X] This case is analyzed in terms of the test of materiality of breach developed by the courts and the commentators.

In applying federal contract law, we are guided by general principles of contract law and by the Restatement. See, Baus, 834 F.2d at 1125 (citing e.g., Eastern Ill. Trust, 826 F.2d at 616) Absent specific language indicating a condition precedent, See, In re Bubble Up Delaware, Inc. v. U.S., 684 F.2d 1259, 1264 (9th Cir. 1982), it is appropriate to interpret the contract language as the mutual exchange of promises supported by consideration. Restatement, supra at Section 232. The nature of this contract required that the BANK perform first. See, Id. at Section 234(2). Pursuant to the Restatement, Section 237, and the explicit terms of the Note, a material failure of the BANK to perform its side of the bargain operated as the non-performance of a condition which excused performance by GULF COAST. Restatement, supra at Section 225(1).

The Restatement lists five circumstances as "significant"[1] in determining in whether a breach is material. See, Id. at Section 241. We consider these factors as guides in applying the all-the-circumstances test, and we believe it is compelling that the BANK's breach was material. GULF COAST was deprived of its specifically bargained for notices of prime rate change by reason of the BANK's failure to send them out. See, Id. at Section 241(a). This was a requirement in furtherance of a government policy of helping small businesses. See, 15 U.S.C., Section 636(a) (1982). The BANK's failures denied that benefit to GULF COAST. The "benefit" the SBA reasonably expected was not financial profit, but assistance to GULF COAST in acquiring specific capital assets that the SBA felt would best help GULF COAST survive and thus benefit the public interest. GULF COAST specifically bargained for this prime rate change notice "within the first ten days of each calendar quarter", as well as compliance with the relevant CFRs.

[1]Circumstances significant in determining whether a failure is material. In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. Restatement, supra at 241.

Such losses are normally best compensated by allowing rescission under the material breach standard, rather than by holding the breach to be a non-material one that might give rise to a damage claim, but not excuse GULF COAST's performance. See, Id. at Section 241(b), Comment "c". By reason of its breach, the BANK admittedly suffers forfeiture, not of its principal, nor its bargained for interest, but rather only for the incremental increase in interest over and above twelve and one-half percent (12-1/2%) per annum, a de minimus forfeiture. [See Appendix J] See, Id. at Section 241(c).

The Seventh Circuit recently approved a District Court application of a somewhat different four-part test of materiality[2] to determine whether the SBA was justified in refusing to honor a loan guarantee. Eastern Ill. Trust, 826 F.2d at 617.

The Seventh Circuit's analysis provides a useful alternate framework to determine the materiality of the BANK's breach. The BANK contends that the bargained-for objective of the contract was not disturbed by its failure to provide notices of interest rate changes, or CFR compliance, because GULF COAST received the interest rate in the Note Notices and thus suffered no detriment. However, the purpose of the quarterly interest rate change notice is to draw the attention of GULF COAST that there are additional interest costs for which it will be liable. It is admitted that "the bank had a duty to the borrower, guarantor and co-guarantor to provide a prime change or interest rate change notice as provided for in the Note." [See Appendix V] It is admitted that "the notice of interest rate change ... was required ... prior to [the bank] being able to charge any increased interest to the borrower, guarantor or co-guarantor, [GULF COAST]." [See Appendix W] The BANK admits "Base rate change notice indicates only loan number and interest rate changes and has been sent to commercial customer since 1988.

Note notices indicate interest rate, balance, how payment is applied, date of next payment and loan number." [See Appendix T]. A base rate

[2]The four factors were: (1) whether the breach operated to defeat the bargained-for objective of the parties; (2) whether the breach caused disproportionate prejudice to the non-breaching party; (3) whether custom and usage considers such a breach to be material; (4) whether the allowance of reciprocal non-performance will result in the accrual of an unreasonable and unfair advantage. Eastern Ill. Trust, 826 F.217 (quoting Eastern Ill. Trust & Savings Bank v. Sanders, 631 F. Supp. 1393, 1396 (N.D. Ill. 1986)). The District Court obtained the factors from a 7th circuit case applying Illinois law. See, Sahadi v. Continental Illinois Nat'l Bank and Trust Co., 706 F.2d 193, 196 (7th Circuit 1983).

change notice [See Appendix BB] is not the same as the note notice, because (1) the Note notices were returned monthly to the BANK by Mrs. Acuna, and (2) what is required is an interest rate change notice.

Based on the foregoing it is appropriate to conclude that the bargained-for objective was defeated. The court in Eastern Ill. Trust recognized that in assessing a government program that is not profit oriented, the Court may consider non- financial objectives and prejudice. See, Id. It has been admitted "that the Note was assigned to the SBA prior to a review of the documents submitted with the Note and the subsequent completion of the purchase of the loan." [See Appendix W]

The reversal of the Summary Judgment of the District Court will cause no difficulty for the SBA, because pursuant to Restatement, Section 237, and the SBA regulations, 13 CFR, Section 122.10(b)(1)(iii), a material failure of the BANK to perform its side of the bargain operates as a non-occurrence of a condition excusing performance by the SBA. Restatement, supra at 225(1). Clear failure by the BANK to perform is shown in Interrogatory 19 [See Appendix X] which demonstrates no communications were received by the SBA from the BANK between April 1, 1982 and February 9, 1988, inclusive, when there were at least eleven (11) purported changes of interest rates [See Appendix Y] for which no notification was given to the SBA, a violation of 13 C.F.R., Section 122.21.

Furthermore, the specific amount and purposes indicated in the loan authorization show the SBA's interest in the continued growth of the borrower through acquiring capital assets; these goals are denied by excusing the failure to provide interest rate change notices as required. Significant financial harm results thereby to GULF COAST. If the BANK's argument is accepted, the specific provisions in the contract [See Appendix J] and CFRs are mere verbiage, subject to the BANK's carte blanche authorization to avoid the disclosures necessary to effectively and profitably manage a small business, the basis upon which the SBA is predicated.

The second factor is whether the breach caused disproportionate prejudice to the non-breaching party. See, Id. The Seventh Circuit recognized the possible prejudice to the SBA's governmental policy of helping small businesses. It is important to recognize the prejudicial impact of the BANK's failure to act on the SBA's policy to promote small businesses and the concomitant failure to amortize the loan within the stated seven (7) year term. [See Appendix L]

The District Court, in Eastern Ill. Trust, found that unfair

advantage would accrue to the SBA if it were allowed to escape a liability for which it had contracted. See, Id. In this case, reversal undoubtedly releases GULF COAST from a contractual liability or at least subjects the actions of the BANK to judicial review. But that advantage is not unreasonable, given the BANK's clear violation of the contracted-for interest rate change notices. Also, since the BANK was paid $229,345.20 under the loan agreement, enforcing the rate change notice requirement would not result in a windfall to GULF COAST; it would merely reduce the authorized interest as a direct result of the BANK's own contractual violation. Affirming the decision of the District Court gives the BANK an unfair advantage directly resulting from its failure to perform the contract terms.

The failure to give the interest rate change notice does relieve GULF COAST of the higher interest rate charges. [See Appendix W] The BANK keeps the twelve and one-half percent (12.5%) and thirteen percent (13%) interest rates. The expert witness testimony [See Appendix R] then shows that GULF COAST paid "their obligations under the Note."

The requirement for notice by the bank within the first ten days of each calendar quarter is not "merely colorable" or "not significantly probative". This is more than a dispute about document dates and whether or not there is a typographical error concerning the dates as discussed in Dombrowski. Dombrowski v. Eastland, 387 U.S. 82, 87 Sup. Ct. 1425, 18 L.Ed.2d 577 (1967), per curiam. There is controverted evidence in the record sufficient to entitle GULF COAST to go to a jury trial. In First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 Sup. Ct. 1575, 20 L.Ed.2d 569 (1968), the Court held plaintiff had the "burden of producing evidence...only after [Defendant] conclusively showed that the facts upon which [plaintiff] relied were not susceptible of the interpretation which he sought to give them." That is not the case here because GULF COAST has produced Summary Judgment evidence that the debt was paid in full [See Appendix R]; GULF COAST has shown that the facts upon which it has relied is consistent with GULF COAST's interpretation of the contract, and the specific language in the contract and has shown that, with one exception, notice was not provided within the first ten days of each calendar quarter [See Appendix Q and Appendix U].

GULF COAST has met its burden of "setting forth specific facts showing that there is a genuine issue for trial. It is a genuine factual issue that properly can be resolved only by a finder of fact, because [it] may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 Sup. Ct. 2505 (1986).

Why is it material? The failure to give interest rate change notices precludes recognition that a given transaction differs from the routine, ordinary monthly loan payments to the BANK. It lulls the bookkeeper at GULF COAST into complacency. [See Appendix EE] The quarterly notice requirement in the Note prevents the BANK from continuously increasing interest rates when rates are rising; "it can only change rates quarterly" [See Appendix J]. This prevents the BANK from taking unfair advantage of GULF COAST and other small businesses as interest rate spikes occur weekly, or daily, during the quarter. **A rate change notice is a notice, whereas a note notice is simply a routine payment.**

The trial judge's Summary Judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could easily find for either the Plaintiff or Defendant. See, Anderson at 255. There are fact issues to be resolved by extrinsic evidence. Specific fact issues which can be resolved only by extrinsic evidence are: (1) whether or not the Code of Federal Regulations were complied with in the administration of the SBA guaranteed loan, and (2) whether or not timely notices were sent, activating higher interest rates [See Appendix Q and Appendix X].

It is clear that if the BANK never sent any notice, then the interest rate of twelve and one-half percent (12-1/2%) would not change during the loan term. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suits under the governing law will properly preclude the entry of Summary Judgment. See, Anderson, 477 U.S. 242, 248 (1986).

The question is: Was the notice sufficient?

If the notice WAS NOT sufficient, then the Note was paid on August 17, 1987.

If the notice WAS sufficient, then the Note had a remaining balance of $39,081.00 and the SBA properly recovered the balance from GULF COAST when the note was paid October 1, 1991.

The answer to that question is a determination of fact.

The Note also provided that the BANK "has the right to raise or lower the monthly payment to assure such payment will amortize the Note within the bounds of the stated maturity." It was the opinion of GULF COAST that the loan had been completely paid after its seven-year term. [See Appendix DD at pg. A-73] That was also intended or

required by the SBA. [See Appendix L] Such an interpretation is consistent with the arguments developed above. It is the manifestation of the intent of 15 U.S.C., Section 631 which is "... It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interest of small-business concerns in order to preserve free competitive enterprise, ... The assistance programs authorized by sections 7(i) and 7(j) of this Act [15 USCS, Section 636(i),(j)] are to be utilized to assist in the establishment, preservation, and strengthening of small business concerns...". Furthermore, there were specific representations to GULF COAST by the BANK that the loan would amortize even though interest rates increased or decreased. If there is an ambiguity in the construction of a contract, that ambiguity must be resolved against the drafter. Channel 20, Inc. v. World Wide Tour Services, 596 F. Supp. 928 (D.C. Tex. 1984).

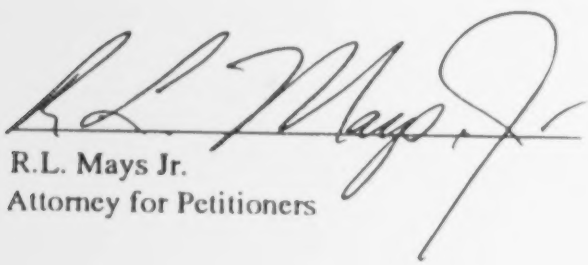
The BANK has the duty of good faith in its contract with GULF COAST, and that duty requires giving notice to GULF COAST. KMC Co. v. Irving Trust Co., 757 F.2d 752, (6th Cir. 1985). The result of the District Court's decision makes the contract unreasonable and places GULF COAST entirely at the BANK's mercy. This is exactly the opposite of the result required in KMC Co. v. Irving Trust Co., 757 F.2d at 759.

The statement by Judge Hughes that the monthly notices were adequate because they indicated the interest rate being charge (See Page A-48) is a determination of a fact issue. The decision that the monthly Note notices satisfies the requirements for interest rate change notification because it is "commercially reasonable" is a determination of material fact. The complete failure to address noncompliance with the Code of Federal Regulations makes the Summary Judgment even more inappropriate. Summary Judgment is not proper where a fact issue exists because the determination of a fact issue is the prerogative of a jury. The denial of Petitioner's right of trial by jury violates Petitioner's rights guaranteed by the Bill of Rights.

CONCLUSION

"A contractual relationship between a federal governmental agency such as the SBA and a private party is qualitatively different from a contractual relationship between two private parties... Materiality of breach with regard to a federal agency raises the issue of how the courts are to deal with breaches of trust which have the potential to impact negatively on the overall success of important governmental programs, such as the guaranteed loan program." Eastern Illinois Trust & Savings Bank v. Sanders, 631 F.Supp. at 1393, 1395 (N.D. Ill. 1986). Based on the foregoing, this case should be reversed and remanded for trial because material fact issues exist which may only be decided by jury trial.

Respectfully submitted,



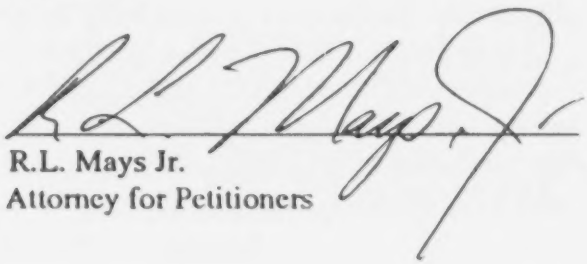
R.L. Mays Jr.
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that I have this date served copies of the foregoing "Applicant for Writ of Certiorari" upon the Respondent by mailing true and correct copies of the same correctly addressed and with sufficient postage affixed thereto to the following counsel:

Mr. Charles Jordan
BARLOW, TODD, JORDAN & OLIVER
17225 El Camino Real, Suite 400
Houston, Texas 77058-2716

This the 14th day of March, 1992.



R.L. Mays Jr.
Attorney for Petitioners

NO.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC.
EDWARD ACUNA SR., AND MARGARET
ACUNA,

Petitioners

vs.

BAY AREA BANK & TRUST,

Respondent

APPENDIX

APPENDIX

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Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATED OF AMERICA, Plaintiff	*	US District Court So. Dist. of Tx.
	*	ENTERED
v.	*	May 13 1991
	*	
GULF COAST HELICOPTER, INC. et.al., Defendants.	*	Jesse E. Clark, Clerk By Deputy
	*	
	*	C.A. NO. H-88-2737
	*	
GULF COAST HELICOPTERS, INC. et.al., Third-Party Plaintiffs,	*	
	*	
v.	*	
	*	
BAY AREA BANK & TRUST, Third-Party Defendant.	*	
	*	

AMENDED FINAL JUDGMENT

On the third-party plaintiffs' unopposed motion, they may amend their third-party complaint.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., AND MARGARET ACUNA recover nothing from BAY AREA BANK & TRUST. BAY AREA BANK & TRUST recovers its court costs from GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR. AND MARGARET ACUNA.

SIGNED on May 9th, 1991 at Houston, Texas.

/S/
LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2496
Summary Calendar

UNITED STATED OF AMERICA,

Plaintiff

VERSUS

GULF COAST HELICOPTERS, INC.,
EDWARD ACUNA, SR., AND MARGARET ACUNA,

Defendants-Third Party
Plaintiff-Appellants,

VERSUS

BAY AREA BANK & TRUST,

Third Party
Defendant- Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H-88-2737)

(December 23, 1991)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:[1]

We decided the identical issues raised in this appeal in a companion case entitled United States of America v. Gulf Coast Helicopters, Inc., et.al. v. Bay Area Bank & Trust, bearing Docket No. 90-2804.

For reasons assigned in our June 5, 1991 opinion in Case No. 90-2804, copy of which is attached, the judgment of the district court is

AFFIRMED.

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2804
Summary Calendar

UNITED STATED OF AMERICA,

Plaintiff-Appellee,

VERSUS

GULF COAST HELICOPTERS, INC.,
EDWARD ACUNA, SR., AND MARGARET ACUNA,

Defendants-Third Party
Plaintiff-Appellants,

VERSUS

BAY AREA BANK & TRUST,

Third Party Defendant.

Appeals from the United States District Court
for the Southern District of Texas
(CA H-88-2737)

(June 5, 1991)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

GULF COAST HELICOPTERS, INC. (Gulf Coast), Edward Acuna, and Margaret Acuna appeal the district court's summary judgment in favor of the USA. We AFFIRM.

I

In July 1980, Edward Acuna, as president of Gulf Coast, executed and delivered a promissory note in favor of BAY AREA BANK & TRUST (Bank), in the original principal amount of $150,000. Payment of the note was guaranteed by Acuna and his wife, Margaret Acuna. The Small Business Association (SBA) guaranteed payment of 90% of the note, which was payable in monthly installments of principal and interest. After the initial three months, the interest rate was to increase or decrease each calendar quarter, at 2 1/4% over the prime rate. Any interest rate change was effective "as of the first day of each calendar quarter." The note provided that payment was to be made in monthly installments of $2,730, "until paid in full, provided that all principal and interest not sooner paid shall become due and payable seven (7) years from date hereof; and each said installment payment, when received, shall be applied...first to interest accrued to the date of receipt of said payment, and the balance, if any, on account of the principal thereof."

The note also required the Bank to give notice of a change in interest rates: the Bank "shall give written notice to SBA and [Gulf Coast] of each increase or decrease in the interest rate within ten days after the effective date of the change." The note also provided that the Bank "has the right to raise or lower the monthly payment to assure such payment will amortize the Note within the bounds of the stated maturity."

From September 1980 through August 1987, the Bank, each month, sent Gulf Coast a "Note notice" that a payment of $2,730.30 was due; and each month, Gulf Helicopter made the exact payment stated on the note notice. However, because of fluctuations in the prime rate, there was a balance due on the note when it matured. At the end of the seven years, demand was made on Gulf Coast and the Acunas to pay the balance of the note, $39,081; they refused, and accordingly, the Bank made a demand on the SBA to purchase its guaranteed portion

[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

of the note. The SBA in turn made demand on Gulf Coast and the Acunas to pay the balance; and when they refused, the SBA filed this action. Gulf Coast and the Acunas filed a third-party complaint against the Bank.

All parties moved for summary judgment; and after a hearing in August 1990, the district court granted summary judgment for the United States.

II

"[Summary judgment is proper when, viewed in the light most favorable to the non-moving party, the pleadings[,] depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.'" Smith v. Xerox Corp., 866 F.2d 135, 137 (5th Cir. 1989) (quotation omitted); Fed. R. Civ. P. 56(c). If the movant meets its initial burden by demonstrating the absence of a genuine issue of material fact, the burden shifts to the opposing party "to demonstrate through affidavits or other competent evidence that a genuine issue of material fact exists for trial." Xerox, 866 F.2d at 137., "Mere allegations or affidavits setting forth ultimate or conclusory facts and conclusions of law are not enough." Id. (quotation omitted). We apply this same standard on appeal. Trial v. Atchison, Topeka & Santa Fe R. Co., 896 F.2d 120, 122 (5th Cir. 1990).

A.

The appellants contend that Gulf Coast received inadequate notice, because the Bank failed to provide the quarterly interest rate changes, as required by the note. They contend also that the note was ambiguous, "particularly as to the terms pertaining to the requirement of notice of the change in interest rate..." They contend, therefore, that summary judgment was precluded. Although the Bank may have failed to send the quarterly notice, each note notice, sent and received monthly, indicated the interest rate in effect and the balance of the note. For example, Mrs. Acuna, secretary and treasurer of Gulf Coast and co-guarantor, testified in her deposition that she received monthly note notices from the Bank and that she noticed the interest rate stated on the notices would change. She stated that although she noticed the changes, she "trusted [her] bank and...expected them to adjust the payments just like they do on our house." Mrs. Acuna testified that the note notices were generally received about a week in advance of their due date, the 17th of the month. The note notice clearly identifies the interest rate and the balance of the note.

Gulf Coast and the Acunas had adequate notice of interest rate changes through the monthly note notice. And, even though the Bank failed to provide the quarterly notice, that failure doe not relive the appellants of their obligations under the note. An analysis of the note

reveals that the Bank's obligation to provide written notice of "each increase or decrease in the interest rate within ten days after the effective date of the [quarterly] change" was, contrary to appellants' position, not a condition precedent to their obligation to pay the note.

Under Texas law, "[c]onditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty." Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976). "Because of their harshness in operation, conditions are not favorites of the law." Id. (quoting Sirtex Oil Industries, Inc. v. Erigan, 403 S.W.2d 784 (Tex. 1966)).

> While no particular words are necessary for the existence of a condition, such terms as "if", "provided that", "on condition that", or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties.

537 S.W.2d at 3. The note in issue contains no conditional language or in any way limits the responsibility of the borrower to perform its payment obligations. The terms of the note are clear, and there is no fact issue to be resolved by extrinsic evidence. See Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979) ("Interpretation of a contract becomes a fact issue to be resolved by extrinsic evidence only when application of pertinent rules of construction leaves a genuine uncertainty as to which of two meanings is proper.").

B

The appellants also contend the Bank had a duty to vary the monthly installment amount to ensure that the note would amortize within the seven years. However, the note states that the Bank "has the right to raise or lower the monthly payment to assure such payment will amortize the note within the bounds of the stated maturity." Although varying the amount due may have been helpful to Gulf Coast, the Bank had no obligation to do so, merely the right. (An SBA official testified that the Bank had an option to vary the installment payment but was not required to do so under the SBA's regulations.) Furthermore, although the term "balloon payment" is not used, the note provided for the possibility that the stated monthly amount would not fully amortize the loan, by stating that $2,730 shall be due each calendar month "until paid in full, provided

that all principal and interest not sooner paid shall become due and payable seven (7) years from date hereof." (Emphasis added.)

Based on our independent review of the record, we find that summary judgment was appropriate. The "threshold inquiry of determining whether there is the need for a trial [is] whether...there are any genuine factual issues that properly can be resolved only in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Furthermore, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Id. at 249-50 (citations omitted).

C

The appellants also contend that they were denied their due process right to a full and fair opportunity to litigate this matter, as well as their Seventh Amendment right to a jury trial. These arguments are without merit.

The appellants were afforded an opportunity to be heard; the court considered their summary judgment motion and response to SBA's motion for summary judgment. There was no deprivation of due process.

Concerning not having a trial by jury, "[t]he function of a jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial. Thus the right to trial by jury does not prevent a court from granting summary judgment." Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988).

III

Accordingly, the judgment of the district court is
AFFIRMED.

Appendix C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 7, 1992

Mr. Robert L. Mays, Jr.
8049 Midcrown Drive
Suite 200
San Antonio, Texas 78218

Re: Gulf Coast Helicopters, Inc., Edward Acuna, Sr.
and Margaret Acuna
v. United States
No. 91-667

Dear Mr. Mays:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/S/

William K. Suter,
Clerk

Appendix D

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix G

15 U.S.C.S., Section 631(a)

. . . It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, . . .

15 U.S.C.S., Section 636(a)

(7) The Administration may defer payments on the principal of such loans for a grace period and use such other methods as it deems necessary and appropriate to assure the successful establishment and operation of such concern.

(8) (A) Any loan made under the authority of this subsection by the Administration in cooperation with a bank or other lending institution through an agreement to participate on a deferred basis, may, upon the concurrence of the Administration, borrower and such bank or institution, have the term of such loan extended or such loan refinanced with an extension of its terms; Provided, That the aggregate term of such extended or refinanced loan does not exceed the term permitted pursuant to paragraph (5); And provided further, That such extended loans, or refinancings shall be repaid in equal installments of principal and interest.

Appendix I

13 C.F.R., Section 119.31

...When deemed necessary, grace period for payment of principal may be provided. Interest payments must be as soon after the loan is dispersed as possible and will be required during any grace period....'

13 C.F.R., Section 120.3(b)(2)(iii)(B)

Subject to paragraph (b)(2)(ii) of this Section, and for loans approved on or after December 1, 1979, a participating lender may utilize a fluctuating rate of interest. The fluctuations may occur not more than quarterly, and must rise and fall on the same basis. Fluctuation periods commence on the first day of a calendar quarter (e.g., January 1, April 1, July 1, October 1). ... Amortization of the loan may be either by fixed principal amounts plus interest at the specified rate for the particular fluctuating period, or by equal payments combining principal and interest; Provided, however, That the equal payment may be based on an interest rate higher than the note rate to insure that future payments will be sufficient to pay interest on the outstanding principal.

13 C.F.R., Section 122.20

(c)(2) On or after October 1, 1978, the lender shall not, without the prior written consent of SBA:

(c)(2)(i) Make or consent to any substantial alteration in the terms of any loan instrument;

(c)(2)(vii) Increase the amount of any prior lien held by the lender on property securing an SBA-guaranteed loan. For the purposes of this subparagraph, "substantial" includes, but is not limited to, increases in principal amount or interest rate or any other action that benefits or confers a preference on the holder.

Appendix J

U.S. Small Business Administration

SBA Loan #
GP-ME 211,398-2010 HOU

NOTE

Pearland, Texas
$150,000.00 JULY 17, 1980

For value received, the undersigned promises to pay to the order of Bay Area Bank & Trust at its office in the city of Webster, State of Texas, or at holder's option, at such other place as may be designated from time to time by the holder—ONE HUNDRED FIFTY THOUSAND AND NO/100—dollars, with interest on unpaid principal computed from the date of each advance to the undersigned at the rate of 12.5 percent per annum, payment to be made in installments as follows: $2,730.00, including principal and interest, payable monthly, beginning two (2) months from date hereof and $2,730.00 on the same date of each succeeding calendar month thereafter until paid in full, provided that all principal and interest not sooner paid shall become due and payable seven (7) years from date hereof; and each said installment payment, when received, shall be applied by the holder hereof, first to interest accrued to the date or receipt of said payment, and the balance, if any, on account of the principal thereof.

Undersigned further agrees that, upon the expiration of a full calendar quarter subsequent to the date hereof, the rate of interest herein shall increase or decrease each calendar quarter to a percentage per annum equal to the interest rate to which the rate in this Note is pegged (the minimum prime lending rate) at large U.S. money center commercial banks as published in the Money Rates Section of the Wall Street Journal, plus two and one-fourth (2 1/4) percentage points, and the change in the rate of interest herein shall be determined and become effective as of the first day of each calendar quarter. Holder shall give written notice to SBA and the undersigned of each increase or decrease in the interest rate within ten days after the effective date of the change.

Notwithstanding the foregoing, the interest rate on this Note shall never exceed the maximum rate permitted by the usury laws of Texas or any pre-empting Federal law, if any, applicable to this loan. Lender has the right to raise or lower the monthly payment to assure such payment will amortize the Note within the bounds of the stated maturity.

If the undersigned shall be in default in payment due on the indebt-

edness herein, and the Small Business Administration (SBA) purchases its guaranteed portion of said indebtedness, the rate of interest on both the guaranteed and unguaranteed portion herein shall become fixed at the rate in effect as of the initial date of default. If the undersigned shall not be in default in payment when SBA purchases its guaranteed portion, the rate of interest on both the guaranteed and unguaranteed portions herein shall be fixed at the rate in effect as of the date of purchase by SBA.

. . . .

The promissory note is given to secure a loan which SBA is making or in which it is participating and, pursuant to Part 101 of the Rules and Regulations of SBA (13 C.F.R., 101.1(d)), this instrument is to be construed and (when SBA is the Holder or a party in interest) enforced in accordance with applicable Federal law.

"The guaranteed portion of the outstanding principal balance of this Note has been transferred to a purchaser for value.

Bay Area Bank & Trust

Dated: 11/15/82[sic]

By: /S/ G.D. Juskowich
G.D. Juskowich,
Senior Vice President"

"Transferred and assigned to Small Business Administration, an Agency and instrumentality of the United States Government, without recouse. [sic]"

BAY AREA BANK & TRUST

Dated: 11/18/87

By: /S/ H.C. Baldwin
H.C. Baldwin, President

ATTEST:

GULFCOAST HELICOPTER, INC. [sic]

/S/ Margaret A. Acuna
Margaret Acuna,
Secretary-Treasurer

/S/ Edward Acuna, Sr.
Edward Acuna, Sr., President

Appendix K

OMB Approval No. 3245-0201
Expiration Date 11-30-90

U.S. Small Business Administration

SBA Loan #

NOTE

City and State

$ DATE , 19

For value received, the undersigned promises to pay to the order of at its office in the city of , State of , or at holder's option, at such other place as may be designated from time to time by the holder dollars, with interest on unpaid principal computed from the date of each advance to the undersigned at the rate of percent per annum, payment to be made in installments as follows:

. . .

If this Note contains a fluctuating interest rate, the notice provision is not a pre-condition for fluctuation (which shall take place regardless of notice). Payment of any installment of principal or interest owing on this Note may be made prior to the maturity date thereof without penalty. Borrower shall provide lender with written notice of intent to prepay part or all of this loan at least three (3) weeks prior to the anticipated prepayment date. A prepayment is any payment made ahead of schedule that exceeds twenty (20) percent of the then outstanding principal balance. If borrower makes a prepayment and fails to give at least three weeks advance notice of intent to prepay, then, notwithstanding any other provision to the contrary in this note or other document, borrower shall be required to pay lender three weeks interest on the unpaid principal as of the date preceding such prepayment.

SBA Form 147(5-87) Previous editions obsolete

. . .

This promissory note is given to secure a loan which SBA is making or in which it is participating and, pursuant to Part 101 of the Rules and Regulations of SBA (13 C.F.R., 101.1(d)), this instrument is to be construed and (when SBA is the Holder or a party in interest) enforced in accordance with applicable Federal law.

...

The holder hereof may at its discretion adjust the amount of the installments due herein to assure such payments will amortize the Note within the bounds of the stated maturity. Holder should give written notice to the undersigned of each increase or decrease in the interest rate within thirty days after the effective date of each rate adjustment; however, the fluctuation of the interest rate is not contingent on whether the notice is given

. . . .

Appendix L

Plaintiff's [SBA] Answers to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Admissions provided on or about August 15, 1989 in Civil Action No. H-88-2737, United States District Court, Southern District of Texas, Houston Division, styled " United States of America, Plaintiff, vs. Gulf Coast Helicopters, Inc, et.al. vs. Bay Area Bank & Trust, Third-Party Defendant" stated as follows:

Request 3

Admit or deny that the loan was intended or required by the SBA to be fully amortized during its seven-year term.

ANSWER: Admitted.

Request 4

Admit or deny that the note states the following regarding a floating interest rate:

Holder shall give written notice to SBA and the undersigned of each increase or decrease in the interest rate within ten days after the effective date of the change.

ANSWER: Admitted.

Plaintiff's [SBA] Answers to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Admissions provided on or about August 15, 1989 in Civil Action No. H-88-2737, United States District Court, Southern District of Texas, Houston Division, styled " United States of America, Plaintiff, vs. Gulf Coast Helicopters, Inc, et.al. vs. Bay Area Bank & Trust, Third-Party Defendant" stated as follows:

Request 2

Admit or deny that the loan was not intended to be a balloon note, meaning that a final payment was intended to be made on the loan which was substantially in excess of the average payment made prior to the final due date.

ANSWER: Admit.

Appendix N

Seal of SBA

U.S. SMALL BUSINESS ADMINISTRATION
2525 MURWORTH, SUITE 112
HOUSTON, TEXAS 77054

February 17, 1988
CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Edward Acuna, Sr.
President
Gulf Coast Helicopter, Inc. [sic]
4810 Comal
Pearland, Texas 77581

Dear Mr. Acuna:

Re: Gulf Coast Helicopter, Inc. [sic]
GP-ME-211,398-2010-HOU

The Small Business Administration has taken over servicing of your loan from Bay Area Bank & Trust.

The Note dated July 17, 1980, payable to the order of Bay Area Bank & Trust, in the principal amount of $150,000.00 is in default according to its terms. The Note has been assigned to the Small Business Administration, and as holder of said Note, this Administration has declared all of the remaining indebtedness due and payable. Payment is hereby demanded in the principal sum of $39,081.00, plus accrued interest.

Any communication with this office concerning this action should be directed to Mr. Tom Swisher, Loan Officer, at the above address or telephone number 660-4471.

Sincerely,

/S/ illegible
D.D. Davenport
Chief, Portfolio Management

PM: ISilos:is 2-17-88[sic]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, PLAINTIFF	*	
VS.	*	
GULF COAST HELICOPTER, INC., EDWARD ACUNA, SR., AND MARGARET ACUNA, DEFENDANTS.	*	NO. H-88-2737
GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., AND MARGARET ACUNA, THIRD-PARTY PLAINTIFFS,	*	
VS.	*	
BAY AREA BANK & TRUST, THIRD-PARTY DEFENDANT.	*	

DEPOSITION OF EDWARD ACUNA, SR.
VOLUME I

August 16, 1989

Houston, Texas

A.
I'm gone when the mail gets in. Most of the time she looks at it or she just places it at the table so when I come in, I look at it.

Q.
You received that type of notice, the second type of notice that you jut talked about every month during the term of this loan, didn;t you?
A.
Yes, sir.

Q.
Did you ever sit down and take time to look at the notice real carefully to notice every piece of information on it or were you just looking to see if the payment had changed?

A.
I just look at it it see what the amount of the payment was. And that's amount what I looked at previously because previously — I don't recall what day it was or what year it was, I had brought up the subject of the increase and decrease of prime rate. And I was told not to worry about it , that it would go up, come down, but then then it went up, it would come down and it would take care of itself.

(Exhibits 1 and 2
marked for identification)

* Exhibit 1 is Appendix Q herein;
Exhibit 2 is Appendix T herein.

Q.
Let me show you what's been marked for the record as Exhibit 1 and Exhibit 2. Now, Exhibit 1 is the notice that you and I have talked about that shows that the interest rate has changed; is that correct?

A.
The one and only one that I have.

Q.
Yes, sir. And that's the only one that you ever received during the history of the loan; is that correct?

A.
Yes, sir.

Q.
Now, Exhibit 2 are examples of the note notice or the payment notices that you've discussed that you got each and every month during the term of the loan; is that correct?

A.
Yes, sir.

Q.
If you would, look at that first one and one that notice, can you tell what the interest rate is?

A.
First of all, let me — I cannot see the date up here, but it appears that this date and this date do not coincide.

...

Plaintiff's [SBA] Answers to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Admissions provided on or about August 15, 1989 in Civil Action No. H-88-2737, United States District Court, Southern District of Texas, Houston Division, styled " United States of America, Plaintiff, vs. Gulf Coast Helicopters, Inc, et.al. vs. Bay Area Bank & Trust, Third-Party Defendant" stated as follows:

Request 4

Admit or deny that the note states the following regarding a floating interest rate:

Holder shall give written notice to SBA and the undersigned of each increase or decrease in the interest rate within ten days after the effective date of the change.

ANSWER: Admitted.

Appendix Q

LOGO OF FLYING SEAGULL

BAY AREA BANK & TRUST

218 Nasa Blvd. Webster, Texas 77598 (713)332-5521

SEAL

Pamela J. Fleming
Assistant Cashier

Gulf Coast Helicopters, Inc.
4810 Comal
Pearland, Texas 77581

Dear Sirs:

As of January 1, 1985, the interest rate on your SBA loan with us is 13.00%.

/S/ Pamela J. Fleming
Assistant Cashier

Appendix R

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATED OF AMERICA, Plaintiff	*	
vs.	*	
GULF COAST HELICOPTER, INC., EDWARD ACUNA, SR., AND MARGARET ACUNA, Defendants.	*	CIVIL ACTION NO. H-88-2737
GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., AND MARGARET ACUNA, Third-Party Plaintiffs,	*	
VS.	*	
BAY AREA BANK & TRUST, Third-Party Defendant.	*	

AFFIDAVIT
OF JOHN HUSTON

THE STATE OF TEXAS)(
)(KNOW ALL MEN BY THESE PRE
)(SENTS:
COUNTY OF BEXAR)(

BEFORE ME, the undersigned authority, on this day personally appeared JOHN HUSTON, who being by me duly sworn upon oath deposed and said as follows:

"My name is JOHN HUSTON. I am over the age of eighteen (18) years and am competent to make this affidavit; I have never been convicted of a crime; and I have personal knowledge of the facts stated herein and they are all true and correct.

"I am an Associate Professor of Economics at Trinity University in San Antonio, Texas, and have been there since 1983.

" I received a Bachelor of Arts degree in 1978 from Carleton College; I received a Master's degree in Economics from the University of Wisconsin in 1981; I received a Ph.D. in Economics from the University of Wisconsin in 1983.

"I am familiar with and have taught interest rate calculations for seven (7) years during the regular course of teaching college courses in principles of microeconomics, intermediate microeconomic theory and managerial economics.

"I have examined the Note in the original principal amount of One Hundred Fifty Thousand Dollars ($150,000.00) dated July 17, 1980 which provides for an initial interest rate of twelve and one-half (12.5%) percent per annum and which provides for a two-month interval between funding and the initial installment repayment.

"Including a change of interest rate on January 1, 1985 from twelve and one-half (12.5%) percent to thirteen (13%) percent and including the actual installment payment of Two Thousand Seven Hundred Thirty Dollars and 30/100 ($2,730.30) instead of the Two Thousand Seven Hundred Thirty Dollars and 00/100 ($2,730.00) as provided in the Note, the attached two (2) pages which are incorporated herein by reference are a true and correct amortization schedule, based on monthly compounded interest, using the exact number of days between actual payments made.

"It is my opinion based on these two (2) interest rates, and the other information as stated above, that Gulf Coast Helicopters, Inc. overpaid the Note with its August 17, 1987 payment by One Thousand Eight Hundred Twenty-Seven Dollars and 56/100 ($1,827.56).

"Further, although unlikely, it is possible for interest rates to go up and down during the term of a loan so that a level installment payment throughout the term of a variable rate loan would completely amortize the loan."

Further, affiant saeth not.

SIGNED this the 11th day of May, 1990.

/S/ John Huston
JOHN HUSTON
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME by JOHN HUSTON on this the 11th day of May, 1990 to certify which witness my hand and official seal of office.

/S/ Nancy D. Leas
Notary Public
Bexar County, Texas
My commission expires: 9-29-91

Notary Seal

Appendix S

Bay Area Bank's Answers to Third-Party Plaintiff's Interrogatories provided on or about August 11, 1989 in Civil Action No. H-88-2737, United States District Court, Southern District of Texas, Houston Division, styled " United States of America, Plaintiff, vs. Gulf Coast Helicopters, Inc, et.al. vs. Bay Area Bank & Trust, Third-Party Defendant" stated as follows:

Interrogatory 24

Please state the entire amount of principal collected by the Bank and the entire amount of interest actually collected and/or charged and placed on the books of the Bank through the date of last payment by the borrower and date upon which the loan was assigned and transferred to the SBA.

ANSWER: Objection. See objection in No. 23. Without waiving objection:

Principal collected	=	$110,919.00
Interest collected thru last payment	=	118,426.20
Principal collected thru assignment date	=	same

BAY AREA BANK & TRUST
P.O. BOX A
WEBSTER, TEXAS 77598

NOTE NOTICE

Date Opened	Note Number	Rate	Per Diem Interest After Due Date	Due Date
7-17-80	1045	10.50	Scheduled	7-17-87

Late Charge:	
Escrow:	
Principal	2,361.32
Interest	368.98
Total Due	2,730.30
Loan Balance:	43,803.05

Gulf Coast Helicopters, Inc.
4810 Comal
Pearland, Texas 77581

IF NOT PAID BY DUE DATE PER DIEM CHARGE WILL BE ADDED DAILY

Appendix U

LOGO OF FLYING SEAGULL

BAY AREA BANK & TRUST SEAL

218 Nasa Blvd. Webster, Texas 77598 (713)332-5521

February 10, 1988

A. Chapa, Loan Officer
U.S. Small Business Administration
2525 Murworth Suite 112
Houston, Texas 77054

RE: Gulf Coast Helicopter, Inc. [sic]
GP-ME-211,398-2010 [sic]

Dear Mr. Chapa,

Thank you for your letter regarding our claim on the above referenced loan. The "Assignment" has been prepared and forwarded to the FAA (copy attached).

The following information is in regard to our notice to borrower of changes in the interest rate. Our system generates a "note notice" (sample attached) each month, and it is mailed to the borrower seven (7) days prior to each due date. In addition to the other timely information rendered each month in this notice, the interest rate as changes occur is provided to the borrower.

My thanks to you for your assistance in this claim.

Sincerely,

/S/ Harvey C. Baldwin
Harvey C. Baldwin
President

HCB:jam
Enc.

Plaintiff's [SBA] Answers to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Admissions provided on or about August 15, 1989 in Civil Action No. H-88-2737, United States District Court, Southern District of Texas, Houston Division, styled " United States of America, Plaintiff, vs. Gulf Coast Helicopters, Inc, et.al. vs. Bay Area Bank & Trust, Third-Party Defendant" stated as follows:

Request 7

Admit or deny that the Bank had a duty to the Borrower, Guarantor and Co-Guarantor to provide a prime change or interest rate change notice as provided for in the note.

ANSWER: Admitted.

Plaintiff's [SBA] Answers to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Admissions provided on or about August 15, 1989 in Civil Action No. H-88-2737, United States District Court, Southern District of Texas, Houston Division, styled " United States of America, Plaintiff, vs. Gulf Coast Helicopters, Inc, et.al. vs. Bay Area Bank & Trust, Third-Party Defendant" stated as follows:

Request 5

Admit or deny that the SBA made no independent investigation of whether the Bank's obligations under the loan and note had been fully completed prior to the Bank assigning the note to the SBA.

ANSWER: Admit to the extent that the Note was assigned to SBA prior to a review of the documents submitted with the note and the subsequent completion of the purchase of the loan.

Request 8

Admit or deny that the provision regarding the notice of an interest rate change was not elective on the part of the Bank but was required by it, pursuant to SBA rules, regulations or policies, prior to it being able to charge any increased interest to the Borrower, Guarantor or Co-Guarantor.

ANSWER: Admitted.

Plaintiff's [SBA] Answers to Third-Party Plaintiffs' First Set of Interrogatories and Requests for Admissions provided on or about August 15, 1989 in Civil Action No. H-88-2737, United States District Court, Southern District of Texas, Houston Division, styled " United States of America, Plaintiff, vs. Gulf Coast Helicopters, Inc, et.al. vs. Bay Area Bank & Trust, Third-Party Defendant" stated as follows:

Interrogatory 19

Please state when the Bank contacted the SBA, on what occasions, by which officer, officers, or other employees of the Bank, what discussions ensued, with which representatives of the SBA, and whether any conversation was conducted concerning the alleged changes in interest rate on the loan and lack of amortization.

ANSWER: SBA received written notice from the Bank of the interest rate changes made on the note on the following dates: Oct. 1, 1980; April 1, 1981; July 1, 1981; Oct. 1, 1981; January 5, 1982; and March 31, 1982. All notices were signed by Pam Fleming, an employee of the Bank. Additionally, Harvey C. Baldwin, president of the Bank, contacted SBA Loan Officer Abelardo Chapa concerning changes in the interest rate by letter dated Feb. 10, 1988.

Appendix Y

OMB Approval No. 3245-0132
Expiration Date 9-30-87

SEAL

U.S. Small Business Administration
Lender's Transcript of Account

Gulf Coast Helicopters, Inc. GP-ME 211,398-2010 HOU
Bay Area Bank & Trust, Webster, Tx. $150,000.00 365

Prepayment terms as stated in the Note

annum/payment to be made in installments as follows: $2,730.00, including principal and interest, payable monthly, beginning two (2) months from date hereof and $2,730.00 on the same date of each succeeding calendar month thereafter until paid in full, provided that all principal and interest not sooner paid shall become due and payable seven (7) years from date hereof; and each said installment payment, when received, shall be applied by the holder hereof, first to interest accrued to the date of receipt of said payment, and the balance, if any, on account of the principal thereof.

Date	Amount Disbursed	Amount Repaid	Application of Payment Principal	Interest
7-17-80	133,511.82			
8-1-80	16,488.18			
9-16-80		2,730.30		2,730.30
10-20-80		2,730.30	326.69	2,403.61
11-17-80		2,730.30	921.92	1,808.38
12-11-80		2,730.30	1189.81	1,540.49
1-19-81		2,730.30	247.02	2,483.28
2-17-81		2,730.30	886.85	1,843.45
3-16-81		2,730.30	1024.32	1,705.98
4-17-81		2,730.30	527.34	2,202.96
5-18-81		2,730.30	361.67	2,368.63
6-16-81		2,730.30	520.02	2,210.28
7-17-81		2,730.30	186.73	2,543.57

8-17-81	2,730.30	12.73	2,717.57
9-17-81	2,730.30	12.97	2,717.33
10-14-81	2,730.30	389.41	2,340.89
11-18-81	2,730.30	0	2,730.30
12-16-81	2,730.30	0	2,730.30
1-19-82	2,730.30	123.60	2,606.70
2-18-82	2,730.30	610.71	2,119.59
3-15-82	2,730.30	971.50	1,758.80
4-19-82	2,730.30	424.49	2,305.81
5-17-82	2,730.30	503.40	2,226.90
6-18-82	2,730.30	488.77	2,241.53
7-19-82	2,730.30	568.35	2,161.95
8-20-82	2,730.30	505.02	2,225.28
9-13-82	2,730.30	512.86	2,217.44
10-18-82	2,730.30	776.49	1,953.81
11-15-82	2,730.30	885.22	1,845.08
12-14-82	2,730.30	957.28	1,773.02
1-17-83	2,730.30	1032.60	1,697.70
2-15-83	2,730.30	1210.72	1,519.58
3-17-83	2,730.30	1370.97	1,359.33
4-18-83	2,730.30	1257.92	1,472.38
5-18-83	2,730.30	1355.04	1,375.26
6-17-83	2,730.30	1323.85	1,406.45
7-18-83	2,730.30	1383.55	1,346.75
8-22-83	2,730.30	1353.15	1,377.15
9-18-83	2,730.30	1365.93	1,364.37
10-17-83	2,730.30	1408.54	1,321.76
11-16-83	2,730.30	1346.10	1,384.20
12-19-83	2,730.30	1405.91	1,324.39
1-19-84	2,730.30	1376.05	1,354.25
2-21-84	2,730.30	1391.56	1,338.74
3-19-84	2,730.30	1491.49	1,238.81

4-18-84	2,730.30	1423.91	1,306.39
5-17-84	2,730.30	1412.75	1,317.55
6-15-84	2,730.30	1408.87	1,321.43
7-16-84	2,730.30	1468.48	1,261.82
8-17-84	2,730.30	1224.53	1,505.77
9-17-84	2,730.30	1317.84	1,412.46
10-16-84	2,730.30	1391.73	1,338.57
11-19-84	2,730.30	1376.09	1,354.21
12-14-84	2,730.30	1435.05	1,295.25
1-17-85	2,730.30	1413.10	1,317.20
2-14-85	2,730.30	1699.24	1,031.06
3-14-85	2,730.30	1730.67	999.63
4-16-85	2,730.30	1654.01	1,076.29
5-16-85	2,730.30	1714.00	1,016.30
6-17-85	2,730.30	1698.69	1,031.61
7-17-85	2,730.30	1787.66	942.64
8-19-85	2,730.30	1813.84	916.46
9-17-85	2,730.30	1830.78	899.52
10-17-85	2,730.30	1878.60	851.70
11-18-85	2,730.30	1868.96	861.34
12-16-85	2,730.30	1914.19	816.11
1-16-86	2,730.30	1907.33	822.97
2-18-86	2,730.30	1926.36	803.94
3-17-86	2,730.30	2020.35	709.95
4-17-86	2,730.30	1981.94	748.36
5-15-86	2,730.30	2039.65	690.65
6-16-86	2,730.30	2037.38	692.92
7-1-86	2,730.30	2093.46	636.84
8-18-86	2,730.30	2104.07	626.23
9-15-86	2,730.30	2123.28	607.02
10-16-86	2,730.30	2191.65	538.65
11-17-86	2,730.30	2216.62	513.68
12-17-86	2,730.30	2250.39	479.91

1-15-87	2,730.30	2253.03	477.27
2-17-87	2,730.30	2272.89	457.41
3-18-87	2,730.30	2333.07	397.23
4-16-87	2,730.30	2303.64	426.66
5-18-87	2,730.30	2332.52	397.78
6-16-87	2,730.30	2337.78	392.52
7-17-87	2,730.30	2361.32	368.98
8-17-87	2,730.30	2360.73	369.57

Date	Int. Rate	Interest Paid From	To	Principal Balance
7-17-80				133,511.82
8-1-80				150,000.00
9-16-80	12.5	9-8-80		
	12.5	9-8-80	10- 1-80	
10-20-80	15.75		10-20-80	149,673.31
11-17-80	15.75	10-20-80	11-17-80	148,751.39
12-11-80	15.75	11-17-80	12-11-80	147,561.39
1-19-81	15.75	12-11-80	1-19-81	147,314.58
2-17-81	15.75	1-19-81	2-17-81	146,427.71
3-16-81	15.75	2-17-81	3-16-81	145,403.39
4-17-81	15.75	3-16-81	4- 3-81	
	19.25	4- 3-81	4-17-81	144,876.05
5-18-81	19.25	4-17-81	5-18-81	144,514.38
6-16-81	19.25	5-18-81	6-16-81	143,994.36
7-17-81	19.25	6-16-81	7- 1-81	
	22.25	7- 1-81	7-17-81	143,807.63
8-17-81	22.25	7-17-81	8-17-81	143,794.90
9-17-81	22.25	8-17-81	9-17-81	143,781.93
10-14-81	22.25	9-17-81	10- 1-81	
	21.75	10- 1-81	10-14-81	143,392.52
11-18-81	21.75	10-14-81	11-15-81	143,392.52
12-16-81	21.75	11-15-81	12-17-81	143,392.52
1-19-82	21.75	12-17-81	1- 4-82	
	18	1- 4-82	1-19-82	143,268.92
2-18-82	18	1-19-82	2-18-82	142,658.21
3-15-82	18	2-18-82	3-15-82	144,686.71
4-19-82	18	3-15-82	4- 1-82	

	18.75	4- 1-82	4-17-82	141,262.22
5-17-82	18.75	4-17-82	5-17-82	140,758.82
6-18-82	18.75	5-17-82	6-17-82	140,270.05
7-19-82	18.75	6-17-82	7-17-82	139,701.70
8-20-82	18.75	7-17-82	8-17-82	139,196.68
9-13-82	18.75	8-17-82	9-17-82	138,683.82
10-18-82	18.75	9-17-82	10- 1-82	
	15.75	10- 1-82	10-17-82	137,907.33
11-15-82	15.75	10-17-81	11-17-82	137,022.11
12-14-82	15.75	11-17-82	12-17-82	136,064.83
1-17-83	15.75	12-17-82	1- 4-83	
	13.25	1- 4-83	1-17-83	135,032.23
2-15-83	13.25	1-17-83	2-17-83	133,821.51
3-17-83	13.25	2-17-83	3-17-83	132,450.54
4-18-83	13.25	3-17-83	4- 7-83	
	12.75	4- 7-83	4-17-83	131,192.62
5-18-83	12.75	4-17-83	5-17-83	129,837.53
6-17-83	12.75	5-17-83	6-17-83	128,513.73
7-18-83	12.75	6-17-83	7-17-83	127,130.18
8-22-83	12.75	7-17-83	8-17-83	125,777.03
9-18-83	12.75	8-17-83	9-17-83	124,411.10
10-17-83	12.75	9-17-83	10- 7-83	
	13.25	10- 7-83	10-17-83	123,002.56
11-16-83	13.25	10-17-83	11-17-83	121,656.46
12-19-83	13.25	11-17-83	12-17-83	120,250.55
1-19-84	13.25	12-17-83	1-17-84	118,874.50
2-21-84	13.25	1-17-84	2-17-84	117,482.94
3-19-84	13.25	2-17-84	3-17-84	115,991.45
4-18-84	13.25	3-17-84	4- 3-84	
	13.75	4- 3-84	4-17-84	114,567.54
5-17-84	13.75	4-17-84	5-17-84	113,154.79
6-15-84	13.75	5-17-84	6-17-84	111,745.92
7-16-84	13.75	6-17-84	7- 1-84	
	15.25	7- 1-84	7-17-84	110,277.44
8-17-84	15.25	7-17-84	8-17-84	109,052.91
9-17-84	15.25	8-17-84	9-17-84	107,735.07
10-16-84	15.25	9-17-84	10- 1-84	
	15	10- 1-84	10-17-84	106,343.34
11-19-84	15	10-17-84	11-17-84	104,967.25

12-14-84	15	11-17-84	12-17-84	103,532.20
1-17-85	15	12-17-84	1- 1-85	
	13	1- 1-85	1-17-85	102,119.10
2-14-85	13	1-17-85	2-17-85	100,419.86
3-14-85	13	2-17-85	3-17-85	98,689.19
4-16-85	13	3-17-85	4- 1-85	
	12.75	4- 1-85	4-17-85	97,035.18
5-16-85	12.75	4-17-85	5-17-85	95,321.18
6-17-85	12.75	5-17-85	6-17-85	93,622.49
7-17-85	12.75	6-17-85	7- 2-85	
	11.75	7- 2-85	7-17-85	91,834.83
8-19-85	11.75	7-17-85	8-17-85	90,020.99
9-17-85	11.75	8-17-85	9-17-85	88,190.21
10-17-85	11.75	9-17-85	10-17-85	86,311.61
11-18-85	11.75	10-17-85	11-17-85	84,442.65
12-16-85	11.75	11-17-85	12-17-85	82,528.46
1-16-86	11.75	12-17-85	1-17-86	80,621.13
2-18-86	11.75	1-17-86	2-17-86	78,694.77
3-17-86	11.75	2-17-86	3-17-86	76,674.42
4-17-86	11.75	3-17-86	4- 1-86	
	11.25	4- 1-86	4-17-86	74,692.48
5-15-86	11.25	4-17-86	5-17-86	72,652.83
6-16-86	11.25	5-17-86	6-17-86	70,615.45
7-1-86	11.25	6-17-86	7- 1-86	
	10.75	7- 1-86	7-17-86	68,521.99
8-18-86	10.75	7-17-86	8-17-86	66,417.92
9-15-86	10.75	8-17-86	9-17-86	64,294.64
10-16-86	10.75	9-17-86	10- 1-86	
	9.75	10- 1-86	10-17-86	62,102.99
11-17-86	9.75	10-17-86	11-17-86	59,886.37
12-17-86	9.75	11-17-86	12-17-86	57,635.98
1-15-87	9.75	12-17-86	1-17-87	55,382.95
2-17-87	9.75	1-17-87	2-17-87	53,110.06
3-18-87	9.75	2-17-87	3-17-87	50,776.99
4-16-87	9.75	3-17-87	4- 1-87	
	10	4- 1-87	4-17-87	48,473.35
5-18-87	10	4-17-87	5-17-87	46,140.83
6-16-87	10	5-17-87	6-17-87	43,803.05

7-17-87	10	6-17-87	7- 1-87	
	10.5	7- 1-87	7-17-87	41,441.73
8-17-87	10.5	7-17-87	8-17-87	39,081.00

Due Date of Next installment: All due 8-17-87
Date through which interest has been paid: 8-17-87
Day interest basis: 8-17-87 to 10-1-87 @ 10.57% = $11.24
ST: 10-1-87 @ 11.7 = $11.78

I Certify This to be a True Copy of Transcript of Account

		Date
/S/ H.C. Baldwin	President	11-18-87
Signature	Title	

Appendix Z

PROMISSORY NOTE

$78,000.00 Houston, Harris County, Texas March 8, 1984

FOR VALUE RECEIVED, the undersigned ("Maker") promises to pay to the order of BAY AREA BANK & TRUST ("Payee"), whose address is 218 Nassa Blvd., Webster, Texas 77598, at its offices in Webster, Harris County, Texas., the principal sum of SEVENTY EIGHT THOUSAND AND NO/100 DOLLARS ($78,000.,00), together with interest on said principal, or so much thereof as may be from time to time outstanding, at a variable rate the "Variable Rate") equal to three percent (3%) per annum above the Prime Rate....

This Note shall be payable as follows:

Principal and interest shall be due and payable in 60 monthly installments of ONE THOUSAND EIGHT HUNDRED FOURTEEN AND 92/100 DOLLARS ($1,814.92), or more, each, payable on the 8th day of each and every calendar month, beginning April 8th, 1984 and continuing regularly thereafter until the whole of said sum, with interest, has been duly paid; interest being calculated on the unpaid principal to the date of each installment paid and the payment made credited to first to the discharge of the interest accrued and the balance to the reduction of the principal.

...

This Note is secured by all liens, security interests, deeds of trust, builder's and mechanic's lien contracts, assignments, security agreements and other rights and documents granted or executed by Maker or any third party in favor of Payee, whether same presently exist or are hereafter created or executed, including, without limitation, a Vendor's Lien reserved in the Deed of even date herewith from EDWARD ACUNA, SR. and wife, MARGARET A. ACUNA to Maker covering the property hereinafter described and a certain Deed of Trust (with Security agreement, Assignment of Rents, and Financing Statement) of even date herewith, executed by Maker to JEAN A. QUARTERMONT, Trustee, in favor of Payee covering the following described tract of land, to-wit:

4.90 acres of land,, being the North 1/2 of Lot 18 out of Section 9, out of the H.T. & B. RR Co. Survey, Abstract 234, out of the Allison Richey Gulf Coast Home Co. Subdivision of Suburban Gardens, Brazoria County, Texas, according to the map or plat recorded in Volume 2, Pages 23 and 24, Plat Records of Brazoria County, Texas, and being the same land described in a Deed dated October 17, 1980, from Malcolm A. Goodman, Trustee, et al, to Edward Acuna, Sr. and wife Margaret A. Acuna, recorded in Volume 1543, Page 165, Deed Records of Brazoria County, Texas.

EXECUTED to be effective the day and year first written above.

GULF COAST HELICOPTERS, INC.

STAMPED PAID
Bay Area Bank & Trust
Webster, Texas
Arrow pointing to 18

By: /S/ Edward Acuna, Sr.

Address:
4810 Comal Street
Pearland, Texas 77581

Appendix AA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE UNITED STATES OF AMERICA

V.

GULF COAST HELICOPTERS, INC.,
Et Al

CA-H-88-2737
August 17, 1990
Houston, Texas
3 p.m.

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT COURT
PROCEEDINGS

APPEARANCES:

For the United States: Mr. William A. Wirth
515 Rusk, Suite 330
Houston, Texas 77002

For Gulf Coast: Mr. R.L. Mays, Jr.
8049 Midcrown Drive
Suite 200
San Antonio, Texas 78218

For Bay Area Bank: Mr. Charles Jordan
17225 El Camino Real
Suite 400
Houston, Texas 77058-2716

THE COURT:

Thank you. Be seated.

MR. JORDAN:

Charles Jordan for Bay Area Bank, Your Honor.

MR. MAYS:

Robert L. Mays, Jr. appearing on behalf of Gulf Coast Helicopters, Your Honor.

MR. WIRTH:

William Wirth on behalf of the United States, Your Honor.

THE COURT:

Have you paid the judgment? I mean the debt?

MR. WIRTH:

To the bank, Your Honor? Yes.

THE COURT:

So you are in it just for your 10 percent?

MR. JORDAN:

Yes, sir. Insofar as the Government is concerned. But we—we were brought in as third party defendants.

THE COURT:

I know that, but I'm trying to minimize the Government's participation.

MR. JORDAN:

Yes, sir.

THE COURT:

So as I recall, there was some collateral.

MR. MAYS:

Yes, Your Honor. There is the helicopter, which is collateral, and then there Was additional collateral which secured the loan. One of the helicopters has been released by the bank, but there is a general catch-all collateral.

THE COURT:

How must is that helicopter that they have worth?

MR. MAYS:

As a rough guess, a quarter of a million dollars. They don't have it. We have it. That is, Gulf Coast Helicopters is in possession and has

the helicopter. But it's worth approximately a quarter of a million dollars.
THE COURT:

All right. Well, I went all through this and, Mr. Mays, I find it inescapable that the notices your client received in terms of payment due notices—I don't even remember what the bank called them, but the payment notices that revealed the interest rates and payment due, were sufficient under the terms of the note to be notices of changes of interest rate.

He agreed to a fixed payment, variable rate note. He had continuous notice of what the interest rate was. It seems to me his best argument is that there may have been some difference between the arrival of the notices and the 10-day period that the note calls for.

But to the extent that that's true, either it results in a fairly modest adjustment in the amount due by kicking the interest—the whole payment back three days, and it would be continuous, but if you moved the first one back, you would move all the rest of them back, and/or just a modest adjustment for whatever plausible harm there could be from the difference between the 10 days and the seven days' notice.

It's I think fairly obvious that he accepted that form of notification, since it had the information, and not complained until the end, that he probably waived any defect, even if it extended any—he should have complained the first time they adjusted the interest rate without the appropriate 10 day—isn't it ten days?
MR. MAYS:

Your Honor—
MR. WIRTH:

Yes, sir.
MR. MAYS:

What was required under the note was a 10 day notice within the start of the calendar quarter. And I believe the summary judgment evidence before the Court is undisputed that there was only one notice that was given during that ten-day interval, and that was approximately January 1, 1985.
THE COURT:

There were continuous notices. He got a notice every month. It didn't say up there "interest rate adjustment notice." That doesn't make any difference. It's information that he was entitled to under the contract.
MR. MAYS:

Your Honor, after the suit was filed, my client began receiving notices of prime rate adjustment, and that is what was required under the terms of this.
THE COURT:

No. Did he get the information once a month of what the interest note was on the note?

MR. MAYS:

The bank did not comply with the terms in the note.

THE COURT:

That I get to decide. What I want to know is whether each month he got a piece of paper that had on it the interest rate he was being charged.

MR. MAYS:

To the best of my understanding, he did receive that.

THE COURT:

He did not?

MR. MAYS:

He did.

THE COURT:

Yeah, he did. Okay. It just wasn't called an interest rate adjustment notice or many other things you could call it, but it had the information he was entitled, that each month he could tell what they had adjusted it to.

And I see no reason that that method of conveying the information Is not adequate for purposes of the contract. Now it may—as I admit, it may be off a little bit from whether it was within the 10 days or within 13 days of the first of a quarter, but that's going to make a de minimus amount of change in the deficiency, and it was probably waived by your client not complaining for years.

MR. MAYS:

Your Honor, I think there are two points of distinction in this case that make that decision erroneous. First of all, it was a fiduciary relationship. My client had an established banking relationship with Bay Area Bank for approximately a 15-year period.

He also had flown the bank officers on helicopter flights, not only to see his business but for other banking related business, as well, as well as having given helicopter rides to secretarial staff.

One of the bank officers—he flew the bank officer's son and his wife, after the son was married, on the start of their honeymoon. He was asked—that is Gulf Coast was asked to join in with Bay Area Bank in a joint advertising campaign.

I would argue that this creates a fiduciary relationship that is over and above the normal banker customer relationship. And in the second--

THE COURT:

I prefer to think of it as debtor/creditor. I know banks don't like to talk about that. That's why they're collapsing all over the place, is they forgot what business they were in.

MR. MAYS:

And the second point of this is that upon inquiry by Mr. Acuna of Gulf Coast Helicopters, he was actually misled. That is, he was told by a bank

officer that interest rates would go up and interest rates would go down, but that the loan would pay out during the 7-year term that he made the payments on the loan.

THE COURT:

Well, that was true in large part.

MR. MAYS:

Well, Your Honor—

THE COURT:

Interest rates went up and interest rates went down, didn't they?

MR. MAYS:

Yes, Your Honor, but if the bank is claiming a $39,000 balance due at the end of the loan when it's been represented to my client, who is not a bank officer, and has his own business to operate, and is not in charge of keeping track of banking business, if he is told that, make your payments, and the payments remain level—and we have expert testimony provided to the Court, which says that if you have a variable rate loan and there are flat payments, that it is possible, though unlikely, that the loan will amortize during the term.

THE COURT:

I mean, I don't know how unlikely it is. It's possible. Depends on what the interest rates do.

MR. MAYS:

Exactly.

THE COURT:

And of course your client understood that the banker who told him that in mid-course knew what the interest rates were going to do.

MR. MAYS:

Your Honor, I don't believe the burden is on my client. My client is not a banker.

THE COURT:

Of course not. Your client didn't know what the interest rates were going to do. The bank didn't know what the interest rates were going to do. That's why they agreed to a variable rate note, isn't it?

MR. MAYS:

Your Honor, that is why the banker has a job as a banker. It's because if he makes that representation, he is held accountable for that representation.

THE COURT:

Wait, wait. The representation is in writing. The deal was that neither of them knew what interest rates were going to do.

MR. MAYS:

Your Honor, the deal was as follows: Holder shall give written notice to SBA and the undersigned of each increase or decrease.

THE COURT:

Mr. Mays, don't change—the deal was that neither one of them knew what the interest rates were going to do. The bank did not tell your client they knew the interest rate were going to go up for five years and then down in an equal amount for five years. Which, incidentally, wouldn't make it come up zero if—I mean it would have to go below what the original rate was going to go to, to make it come out zero, coming out even.

Nobody told your client that they knew what interest rates were going to do. The deal they entered into was a joint admission of uncertainty. If they knew, they could have written it down, but they didn't know, and they were concerned that it was going to change. That's what they wrote down.

And do you want—I will assume that somebody said to you client, if they go up, then they go down, it may even out in the end. I suspect your client said, I need to know how much to budget for. I can't budget $500 this month and $750 the next two months and $300 the next month to meet my debt service. I need a number to work with in my business. So they agreed on a level payment, variable rate loan.

Now, it doesn't matter whether your client appreciated the consequences of that deal fully or not. That's what he agreed to. It only matters that a fair reading of the note as written is what they agreed to.

It was not modified by a gratuitous assertion by a bank officer later, that, don't worry about it, it may even out. A, because it's true, it may even out. And B, because it was speculation. It's not a present material fact. It's an opinion about a potential future state of facts, not present material fact.

None of the elements—the joint advertising. In the joint advertising relationship, the bank may have owed your client a fiduciary duty to not skim money off the joint advertising account and not to somehow put him a less favorable position than they had agreed, but that relationship, the partnership for advertising, limited the fiduciary relationship to the advertising. The pilot/passenger relationship is not a fiduciary duty. The debtor/creditor relationship is not a fiduciary duty.

They do have a duty reasonably to dispose of the collateral, but it's a commercial reasonableness and not anything personal to your client.

I assume your client trusted these bankers. But they're just bankers, and the deal was a banking deal. On top of it, your client had the United States guarantee 90 percent of it. The taxpayers were party to this, too.

And so if there's a duty owed, there's probably a serious duty on your client's part to the people who guaranteed the note, to know what he's doing with our money.

But the idea that somebody who is borrowing $150,000 with a guarantor can ignore the terms of the note, ignore the monthly notices, simply is not legally tolerable and it's not commercially tolerable.

MR. MAYS:

Your Honor, if I may draw the Court's attention to the facts concerning the SBA, one of the requirements of the loan was that the bank notify the SBA on a quarterly basis as to when interest rates were changed. On a 7-year loan, quarterly payments required approximately 28 notices.

In the answers to interrogatories, there are, to the best of my recollection, eight notices which were provided by the bank to the SBA. This indicates to me that it's very clear that the SBA was not performing its duty in monitoring the bank. If that had been the case, then this problem may well not have arisen.

THE COURT:

There are several problems with that, Mr. Mays. First, The Acunas have no standing to assert defects in the SBA's defense to the bank. To the extent that the bank did not do what it was supposed to for the SBA, that's between the SBA and the bank attempts to enforce the guaranty.

That the SBA stood behind your client is not an undertaking by the SBA for your client's benefit for them to monitor they way the bank works. There is actually an agency of the United States that's supposed to do that, the FDIC. They don't do it, either, but that's not involved in this case.

The SBA's job in this was to make sure that your client met the qualifications under the statute that allowed the taxpayers to guarantee his note. The SBA's responsibility should continue to see that the note is managed correctly.

But none of their defects, if I assume that there are defects in their handling of this account, enure to the benefit of your client. And as I take it from several inches of stuff here, the SBA has not complained of its failure to be noticed, it has performed its obligation to the bank and now wants your client to do his part.

MR. MAYS:

The other problems that we have that the Court has not addressed at present, concerns overreaching by the bank. My client, during the period that this litigation has been going on, had another loan for land with the bank.

He made all of the payments on that loan. The loan was completely paid off during the pendency of this litigation. There has been overreaching by the bank during this time period because the lien on the land was not released for a period of some 15 months from the time that the land loan was completely paid off, until he received the release of lien, to the detriment of my client in attempting to operate his business and

attain additional financing. In addition—

THE COURT:

Wait a minute. If the bank didn't release the deed of trust on the land when that note was paid, that's a separate question on whether this note has been paid. And I don't think there's any doubt that your client did not pay this note in full.

His best defense is that he didn't receive the notices for which the note provided, but I have found the notices he received to be commercially sufficient and so he needs to pay the rest of the note.

Now, we will move to whether there's an offset or a credit or just money your client gets because of something else the bank did in another deal later. But there is not fiduciary relationship in this transaction. The fact that they had other relationships is completely unimportant. In no way does a pilot/passenger relationship impact on a debtor/creditor relationship.

Is the United States implicated in the second transaction?

MR. MAYS:

No, Your Honor.

THE COURT:

You think you are?

MR. WIRTH:

No, Your Honor.

THE COURT:

All right.

All right. Well, I'm going to enter the summary judgment. Is the United States suing for its 90 percent or the full amount? I mean we've got this—

MR. WIRTH:

It's the full amount of the note, Your Honor. The bank has a participation interest with the SBA for the full amount.

THE COURT:

You all will take care of that. The United States will get judgment for the balance due on the note as calculated by the Bay Area Bank.

And did that—the United States had the company and both the Acunas as obligors?

MR. WIRTH:

The Acunas are guarantors, Your Honor.

THE COURT:

That will run jointly and severally against all three of those parties.

All right. Now let's move to the land deal.

MR. MAYS:

All right, Your Honor. Recently I filed a motion to supplement pleadings on the basis of information which was provided last month by the bank. This was the land loan, which I believe is numbered 5679.

We were provided interest rates by the bank, and as soon as our expert had finished examining these, his conclusions were that Gulf Coast had been overcharged, I believe it was about $2,500, on the land loan, which was paid off I believe approximately two years ago.

And again, the bank had not had the opportunity to depose the expert. Again, one of our claims in this is that there was overreaching by the bank again, in that although the land was paid off, according to whatever the bank said was owed, it was completely paid.

THE COURT:

All right. Let me make sure—do we have the note paid?

MR. JORDAN:

Yes, sir. That particular note was paid. There is a deed of trust that obtained a—

THE COURT:

Wait a minute. When was it paid? Just roughly. Give me a date.

MR. JORDAN:

Roughly, Judge, must have been 15 months ago. Something like that.

THE COURT:

So somewhere around May of '89?

MR. MAYS:

It was paid on the 18th. We have a release of lien dated February 9, 1990, Your Honor, and I cannot tell from the date stamp on the last page what the date was that it was paid.

THE COURT:

Have you seen this time stamp?

MR. JORDAN:

No, sir, I haven't.

THE COURT:

It has a day and no month and no year.

MR. JORDAN:

I haven't seen it, Judge.

MR. MAYS:

It was approximately 15 months ago.

THE COURT:

Somewhere around April or May of last year sometime. Well, give that to them.

MR. JORDAN:

All right.

THE COURT:

Then the release later. But it is the bank's position, as I recall, Mr. Jordan, that there is another [sic] indebtedness clause?

MR. JORDAN:

Yes, a Mother Hubbard clause in the deed of trust. When the note was paid, we were in litigation. This litigation. The Acunas still owed the bank. It was the bank's position until that was cleared up, at least—

THE COURT:

Why did you release them?

MR. JORDAN:

It was released because we were approached by Mr. Acuna, through his attorney. He said that he was now seeking to finance another helicopter, wanted to use that land as collateral. And we discussed it, decided to do the right thing.

Judge, in all seriousness, though, we did discuss it.

THE COURT:

I managed to keep a straight face through that.

MR. JORDAN:

I know. It was just a—

THE COURT:

Do you doubt that there was a Mother Hubbard clause in that deed of trust? I thought we went through this once before.

MR. JORDAN:

Yes, sir, we did.

MR. MAYS:

I do not recall.

THE COURT:

I had one somewhere. Somebody have a copy of the deed of trust right quick?

MR. JORDAN:

No, sir. I don't think it was attached. It wasn't part of this particular summary judgment. I don't think it's attached anywhere for the Court's benefit. I don't have it with me, Judge. The land loan sort of came after everything else.

THE COURT:

I know, but he's raised that as some sort of--

MR. JORDAN:

Yes, sir, I understand.

THE COURT:

ean I'm going to go ahead and sever the judgment on the $150,000 note, make it final an enforceable.

Now, I wouldn't object if somebody wanted to give the Acunas time to, you know, if they wanted to work out some payment scheduled on a fairly short order. I'm not telling anybody they have to, but I would rather see the United States get paid with interest than something dramatic happen like—I mean if that helicopter is worth that much money, there ought to be a third party solution out there so somewhere some welder in Kansas doesn't have to pay taxes to cover for this loan.

As the years advance, it becomes increasingly difficult for me to read these security agreements, but I suspect there's another indebtedness clause in this mass of gray print that's been xeroxed, in the original security agreement, too.

MR. JORDAN:

Yes, sir. I just can't get my hands on it. I can supplement to the Court.

THE COURT:

Right there, actually in Section 1 it says all obligations, indebtedness, whatever, whenever, however incurred. And I can't imaging the bank, even if they're sloppy, can't print it on a form. In most cases comes printed straight from the stationery store.

All right. Well, that needs to be addressed.

But, Mr. Mays, what can I do? If there's another indebtedness clause, they had a right to hold it.

MR. MAYS:

Well, Your Honor, we think that if the loan is paid off—and again, I just don't recall, but given the tremendous amount of collateral which the bank had, we believe that it should have been released at the time.

THE COURT:

But they don't have any obligation. I mean a bank that has a $5 loan and $100 worth of security is what we call a prudent bank. There are not any of those, apparently. But they're under no obligation, when they're over secured, to release the title, except in bankruptcy court.

I mean, but that's a different problem. If they want to demand a hundred multiple to secure a loan, that's part of the transaction. That makes them real secure. They sleep better at night that way.

So assuming that we have $30,000 worth of debt—and how much do you think the land was worth?

MR. MAYS:

The land was worth—it was financed for 78,000, and I believe it's worth more than that. And the helicopter substantially more than that.

I mTHE COURT:

A minute ago didn't you say the helicopter was $200,000?

MR. MAYS:

Yes, sir. Or I believe $250,000.

THE COURT:

We have $350,000 collateral and a $30,000 loan. There's nothing illegal or immoral about that. Just unusual. And when you pay your house mortgage down, the last couple of payments on your house, they have got a security interest in your entire house for the last month's payment, don't they?

MR. MAYS:

They—

THE COURT:

You pay for 30 years and your house has appreciated to probably at least nominally 10, 15 times what you paid for it, and for that last payment, the mortgage company still has the security interest in the entire house. And all the accretions that you have made to it. That's the way life works.

With your car you have a better deal because it depreciates about as fast as you pay it off, so at then nobody has got anything.

But I will assume that they had $350,000 worth of collateral when the bank loan—when the land loan was paid off in the spring of '89, and that they refused to release it, to continue the lien in the deed of trust as security for this $30,000 balance on this note, until whenever they released it.

There is just nothing illegal about that. I mean there being a security agreement signed by your client, they could have used the helicopter as security for the land loan and vice-versa. So I think to cut the hemorrhaging by expenses, I ought to go ahead and grant summary judgment on the third-party claim—or actually it's the counterclaim, they way we have reorganize this.

Do you see any reason not to do that?

MR. MAYS:

Yes, Your Honor, I do. I believe the Court should not be rendering judgments on the basis of what we suppose the documents say. I mean I just think that is unreasonable.

THE COURT:

Well, this action has been pending two years. Why don't you tell me what the document says.

MR. MAYS:

Your Honor, I received the information on the interest rates last month from the bank.

THE COURT:

Well, what about the interest rates?

MR. MAYS:

In order to determine whether or not there were overcharges on the land loan, and that—

THE COURT:

I'm not interested in overcharges. The only claim about the land loan is that retaining the lien on th loan was illegal. The lien on the land was illegal because that loan was paid off.

That entire question is determined by the contents of the deed of trust or the other loan agreements having to do with that land, aren't they?

MR. MAYS:

They are, and I don't believe they're before the Court at this time.

THE COURT:

Well, don't you think two years is long enough for you to get them before the Court if they said anything?

MR. MAYS:

That—

THE COURT:

What do you think they say?

MR. MAYS:

Your Honor, I don't know.

THE COURT:

Then why don't I dismiss it for want of prosecution if at this point you don't know what it says.

MR. MAYS:

All that I know is that the burden is on the bank, and a motion for summary judgment is going to be found against my client to produce the documents. If they're not before the Court, it's the bank's burden.

THE COURT:

Well, there is another burden. Are you familiar with the burden on your client not to bring actions that he about reasonably investigated? And if he has not read the language of the deed of trust and cannot point, cannot assert the absence of point to a defense to the further indebtedness language, I think it would be fair to say that's not a reasonable investigation before filing suit.

Are you familiar with that duty?

MR. MAYS:

Yes, sir, I am.

THE COURT:

So two years after filing suit for six or seven million dollars, you can't

tell me what the documents that give rise to the lawsuit say?

MR. MAYS:

Yes, sir. That's correct. However, this was a collateral issue before the Court, before the Court has made its decision on the primary issue.

THE COURT:

When did you file the third party action?

MR. MAYS:

Third party action was filed before the land was paid off. It was filed—I don't recall. I would assume in '88.

THE COURT:

As usual, I have several copies of some things and none of the others. It's not attached to your third party complaint, apparently. I have got a bunch of copies of the security agreement on the helicopter. None apparently on the land.'

Very well. Mr. Jordan, if you will see that motion for summary judgment and perhaps one for sanctions is filed so we can get this case closed.

THE COURT:

Yes.

MR. MAYS:

Thank you, Your Honor.

MR. JORDAN:

Thank you, Your Honor.

081188-486-000-557-T24-JMR-

BAY AREA BANK & TRUST
P.O. BOX A
WEBSTER, TEXAS 77598-076[sic]

PRIME CHANGE
NOTICE

Gulf Coast Helicopters, Inc.
4810 Comal Street
Pearland, Texas 77581

Effective 07/14/88 the prime rate of has been changed from 9.0000% to 9.50000%. We have adjusted the rate on your loan #5679 to 12.5000% as of the above date.

Appendix CC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	]	
	]	
vs.	]	CA H 88-2737
	]	Houston, Texas
GULF COAST HELICOPTERS, INC.,	]	April 30, 1990
EDWARD ACUNA, SR.,	]	12:15 p.m.
MARGARET ACUNA,	]	
BAY AREA BANK & TRUST	]	

HEARING

Before the Honorable Lynn Hughes

APPEARANCES:

For the Plaintiff:

Mr. William Allen Wirth
United States Department of Justice
515 Rusk, 3rd Floor
Houston, Texas 77002

For the Defendants Gulf Coast Helicopters and the Acunas:

Mr. R.L. Mays, Jr.
8049 Midcrown Drive, Suite 200
San Antonio, Texas 78218

For the Defendant Bay Area Bank & Trust:

Mr. Charles M. Jordan
17225 El Camino Real, Suite 400
Houston, Texas 77058

Proceedings reported by stenography, transcript
produced by computer-aided transcription

Ms. Joyce K. Schaefer
Official Court Reporter

MR. WIRTH: Your Honor, William Wirth for the United States.

MR. MAYS: Your Honor, Robert L. Mays, Jr. representing Gulf Coast Helicopters.

MR. JORDAN: And Charles Jordan representing Bay Area Bank & Trust.

THE COURT: It is the best motion for continuance I've ever seen. It is granted.

MR. JORDAN: Thank you, Your Honor.

THE COURT: All right, since we are going to have to continue it, I guess there is no harm in letting the late designation of experts and do some more discovery. But tell me what the — what the bank did that caused all these problems.

MR. MAYS: Your Honor, if I may, our contention is that the loan that Mr. Acuna had, who is the president of Gulf Coast Helicopters, he had a loan for $150,000 which was supposed to pay out over a seven-year term. At the termination of the seven-year term period with Gulf Coast Helicopters having made the monthly payment every month, Mr. Acuna was informed at the end of that time there was a balloon payment of some $39,000 which was still owed. Mr. Acuna objected stating that the amounts had been paid in full. He had had numerous other loans at the bank, and this was the first instance this had occurred. Bay Area Bank, upon the refusal to make payment, then sought to make good on the guarantee by the SBA. The SBA made the payment to Bay Area Bank pursuant to its guarantee and then south [sic] recovery against Gulf Coast Helicopter.

THE COURT: Have you done any arithmetic on the payments on the loan?

MR. MAYS: Yes, sir, I have.

THE COURT: How do they come out?

MR. MAYS: They come out that Mr. Acuna has overpaid the loan by approximately $1800. The dispute in this litigation is whether or not adequate notice was given as is required by the note of changes in the interest rate. And in general, during the life of this loan, increases in the variable rates at the beginning of the term of this note. Mr. Acuna's testimony by affidavit—by deposition testimony, is that he received one notice of an increase from 12 and a half percent to 13 percent.

THE COURT: What do the bank's records show?

MR. MAYS: The bank's records show—they do not show the required notice to Mr. Acuna, as is required by the note.

THE COURT: So the $39,000 or $42,000 difference, whatever it is, would be entirely attributable to increases in the interest rate?

MR. MAYS: That is correct, Your Honor.

THE COURT: That is right for the government?

MR. WIRTH: Yes, Your Honor, it is.

THE COURT: What makes the government think that interest rate notices were given?

MR. WIRTH: Your Honor, both Mr. and Mrs. Acuna, in their depositions, have stated that they received monthly notices from the bank that stated the payment due and the current interest rate. The bank has shown the copies it has of those notices and it shows how the interest rate changes. There is no specific notice that went out to the Acunas saying your interest rate has changed, but there was a notice every month of the changes in the interest rate.

THE COURT: Do either of you have that deposition or one of those notices?

MR. MAYS: No, sir, I don't believe I have it.

MR. JORDAN: Judge, if I may, I filed a Motion For Summary Judgment on behalf of the bank and attached copies of the bank notices I would like to present to the Court.

THE COURT: Why wouldn't these notices be sufficient?

MR. MAYS: Well, Your Honor, first of all, it is our contention that the note requires two things. First of all, the note was not set up as a balloon note.

THE COURT: That is not—the question was why aren't notice where it's got date opened, note number, rate, per diem after due date, due date, late charge, escrow, principal, interest, total due, loan balance, why aren't those enough to meet the notice requirement of the note?

MR. MAYS: The note requires that the notice be given within ten

days of the beginning of a quarter. These payments were due on the 17th of every month. The statement by the bank, if I recall correctly, the bank's letter to the SBA was that these notices were sent out seven days prior to the time of payment. So it required a separate notice to Mr.—to the Gulf Coast Helicopters that the payment rates had gone up and that he was liable for those increases in payment.

THE COURT: No, he doesn't need notice that he is liable. The note doesn't; require that, and common sense doesn't require it.

MR. MAYS: Your Honor, the note specifically requires—

THE COURT: Notice of interest rate changes.

MR. MAYS: Exactly. And within the first ten days of the beginning of a quarter in order for him to be liable for those obligations.

THE COURT: It does say calendar quarter. If it said quarterly, I would treat the whole thing as being from the 17th to the 17th. It says calendar quarter.

MR. WIRTH: Your Honor, Mrs. Acuna testified she received those notices between seven and ten days from their due date which means between the — 10th — I am sorry, the 7th and the 10th day of the month. If the calendar quarter started on the first day of the month, then the bank would have been on target.

MR. MAYS: Your Honor, we belief [sic] that the real issue is whether or not Gulf Coast Helicopters was given required notice. Mr. Acuna, the president of Gulf Coast Helicopters has an eight grade education. Mrs. Acuna, his wife, did not proceed as far along in school as that. We believe the bank, in order to claim any kind of deficiency, has an absolute obligation to meet every contract term that is to their—provides them notice and allows them to make payment under the terms of the note. We believe they've simply failed to do that.

THE COURT: Whatever the educational level of the clients, they've borrowed $150,000 in a commercial loan for a business venture and got the United States to guarantee it.

MR. MAYS: And, Your Honor, the record shows—

THE COURT: So I don't care whether they are well educated or not under those circumstances.

MR. MAYS: Your Honor, the record shows that they made every payment. They have paid some $220,000, principal and interest. So it is not a question of whether or not the loan was repaid. The loan was repaid in full.

THE COURT: Where is the helicopter?

MR. MAYS: The helicopter is still with Gulf Coast Helicopters.

THE COURT: Is he still making money with it?

MR. MAYS: Yes, sir, he is.

THE COURT: Well, in the time we've been arguing about this, we could—he could have paid it off, the extra interest. It is not like they shut him down or anything.

MR. MAYS: Well, Mr. Acuna or Gulf Coast Helicopters also had a loan with the bank for land. That loan was completely paid off. The bank delayed over a year in providing the note and release of lien on the land for the business.

There is a continuing relationship and it is not just this one particular item. Goodness knows, in any contract, there are few enough protections for a borrower. Given the specific notice which was given to Gulf Coast Helicopters, and there was one that my client received, when you take that specific notice plus the original 12 and a half percent notice specified in the original note, my client has overpaid by about $1800 on this particular loan. And we simply believe that there is no additional money that is owed.

THE COURT: Is this bank still in business?

MR. JORDAN: Yes, sir, it is, in Webster.

THE COURT: Hum. That is a curiosity right there.

Have you looked at their accounting? I mean has their computer spit out each date of the change and all that?

MR. MAYS: You Honor, that is provided in, I believe, the Motion For Summary Judgment. It is a handwritten document. And that is the information that was used to determine, again, with the two interest rates, the 12 and a half percent and the 13 percent. That was the information which was used to determine that, in fact, Gulf Coast Helicopter has overpaid this loan.

THE COURT: Well, how does the bank figure the deficiency?

MR. JORDAN: Your Honor, the bank figures the deficiency based upon the fluxuating [sic] interest rates over the six-year [sic] term of the loan. In fact, Mr. Acuna's own accountant has testified as to the deficiency, the same amount of deficiency if given the fluxuation [sic] in interest rates. But what Mr. Acuna and Gulf Coast Helicopters are doing, Your Honor, is assuming that the bank has no right to claim any interest rate other than 12 and a half percent and 13 percent over the seven-year term. That is how they are assuming the $1800 balance. What the bank did is assume the notices — and this is the way they handled it through the seven-year term, that the notices given were sufficient. That this was — and the interest rates then fluxuated [sic], and that is how they determined the balance at the end of the seven years.

What happened was, this was during the period of high interest

rates. The payments remained level through this period of time. At the end of the term, there was a balance due. And that is when the dispute arose.

THE COURT: Well, it is clear that if the rates had dropped and he paid level payments, he would have paid the note off earlier and overpaid it.

MR. MAYS: And, Your Honor, that is exactly the point. My client has had multiple loans with the bank and we have sought additional information. And it is my belief that he has overpaid on other loans, and the bank has never drawn that to their attention.

THE COURT: Well, again, if your client wants to send the bank money without knowing where it is going, he is worse than uneducated.

MR. MAYS: Well, Your Honor—

THE COURT: He's got an accountant. His accountant doesn't understand those things.

MR. MAYS: Well, Your Honor, I can't speak for his accountant, but Gulf Coast Helicopters has had a continuing relationship, almost 15 years with the bank. This is the first loan that all of a sudden, there is a balloon payment due.

THE COURT: Well, but there was going to be either an overpayment or balloon payment if there was any change in the interest rate during the seven-year period, wasn't it?

MR. MAYS: Your Honor, the note specifically says that the bank has the right to ensure that the loan amortized within the term. But we believe that that also gives rise to a duty to inform—

THE COURT: The right and obligation are not the same thing. I have the right to vote and I don't have to vote if I don't want to. And they had the right to adjust the monthly payments and if they chose not to, your client can't complain about that.

MR. MAYS: If he is required to be given notice, absolutely we have a right to be given notice about that.

THE COURT: Not about the not changing the payments. There is no provision in this note that says your client has the right to require that the monthly payment be changed so that it will amortize completely. It says the bank, if they choose to do it, can do it. And I'll bet you somewhere in there there is a forebearance clause that says if they don't exercise any right, excluding rights of default, that doesn't mean they have waived them.

MR. MAYS: Your Honor, we believe we are entitled to rely on the section of the note that says we be given notice.

THE COURT: But it doesn't say anything about notice that you are going to overpay or underpay. Where is that in the note?

MR. MAYS: Well, that — I have not reviewed the note to be able to answer that.

THE COURT: And anybody knows if you calculate a note based upon 12 and a half percent, if the interest rate changes, it is going to alter the date of payout, isn't it, or the amount of payout? It has to.

MR. MAYS: That is right. And we believe that we are entitled to be given notice when there is a change.

THE COURT: No, you are only entitled to notice of the change of the interest rate. And apparently the evidence is your client got notice of change of interest rate.

MR. MAYS: Your Honor, we disagree that he got change notice of the interest rate within the time specified in the note.

THE COURT: All right. Well, you filed your Motion for Summary Judgment this morning.

MR. JORDAN: Yes, sir.

MR. WIRTH: Your Honor, the United States has filed one this morning also.

THE COURT: You need to respond to them. And then I guess I'll decide it based on that. But the only issue seems to be whether they comingled with that provision. But he is not entitled to be—have his hand held and be told that if the rate goes up, he is going to owe money at the end, or if it goes down, he won't owe as much.

MR. MAYS: Well, Your Honor, we believe there is another issue. Because if, in fact, he was not given the proper notice and if, in fact, Gulf Coast Helicopters has overpaid, then we believe we have a clear case of usury. If my client has overpaid on the loan and owes nothing, then any charge by the bank against my client is a usurious charge.

THE COURT: No, usury is more than the legal amount, not more than the contract amount. The fact that your client agreed to pay ten and he paid 12 doesn't make it usury unless 12 is illegal. Part of this goes back to the period during which banks could charge any interest they wanted to, doesn't it?

MR. JORDAN: Yes, sir, that is correct. There was a ceiling, Your Honor, but it was like 23 or something like that.

THE COURT: Well, file your response, then I'll look at it. Thank you.

(Whereupon, the above-entitled matter was adjourned)

Appendix DD

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	*	
PLAINTIFF	*	
	*	
VS.	*	
	*	
GULF COAST HELICOPTER, INC.,	*	
EDWARD ACUNA, SR., AND	*	
MARGARET ACUNA,	*	
DEFENDANTS	*	No. H-88-2737
	*	
	*	
GULF COAST HELICOPTERS, INC.,	*	
EDWARD ACUNA, SR., AND	*	
MARGARET ACUNA,	*	
THIRD-PARTY PLAINTIFFS,	*	
	*	
VS.	*	
	*	
BAY AREA BANK & TRUST,	*	
THIRD-PARTY DEFENDANT.		

DEPOSITION OF EDWARD ACUNA, SR.
VOLUME I

August 16, 1989 Houston, Texas

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. . .

Q.

From 1975 until 1980 when the loan that's the subject of this lawsuit was made, did the bank loan you other monies that were also guaranteed by the S.B.A.? Did you make several loans at Bay Area Bank & Trust?

A.

Yes. Well, in between that time, I needed an extra helicopter and S.B.A. gave me a direct loan for another helicopter.

Q.

When was that, do you recall?

A.

March 25th, '77 for 110,000.00

Q.

And what kind of helicopter was that?

A.

That was a 206A model.

Q.

And was the 110,000 loan made directly to you by the S.B.A.?

A.

Yes, sir.

Q.
And was all that money used to purchase the second helicopter?

A.
Yes, sir.
. . .

Q.
All right, sir. But this format is the kind of note notice that you received before; is that correct?

A.
With this indication up here, it appears that that's the way it was.

Q.
All right, sir. And those indications that you've shown, just for the record, is the date opened, note number, rate, the per diem interest after due date and the due date; is that correct?

A.
That is correct.

Q.
All right. And did those other note notices not only show that but also the loan balance?

A.
I don't recall. I don't know.

Q.
All right, sir.

A.
I don't remember.

Q.
During the term of the loan, did you even call the bank and talk to any of the officers about the interest rate?

A.
I believe I talked to Mr. Quartermont.

Q.
And what did you and Mr. Quartermont talk about?

A.
I previously stated about the interest rate, if it goes up, should my payment go up and it would go down, go down, you know.
In other

words, like an airplane, it will go like this, up and down, and finally it would stabilize by itself. It was the same thing they told me, not to worry, it's going to go up and it's going to go down and at the end it will all be paid for. Don't worry about it.

Q.
When did you talk to Mr. Quartermont, do you recall?

A.
I don't recall, but I've got some notes someplace. I believe so.
(Exhibit 3
marked for identification)

Q. Would you look at Exhibit 3 and identify that for us, please? What are those?

A.
This is my own personal scribbling on a daily—-

Q.
You keep daily notes?

A.
Whatever to call bank or who I call of whatever, prices.

Q.
All right. Now, in talking to Mr. Quartermont, would those daily notes—well, before we get there, Exhibit 3 is all in your handwriting is that correct?

A.
Most of it.

. . .

Q.
Besides that notice, did you receive any other types of notices during the history of the loan? I'm not talking about did you receive any more of these types of notices, but did you receive any other notices?

A.
We received our customary monthly payments.

Q.
And that notice said what, do you recall?

A.
Like I stated before, my wife does the payments on those things. And every now and then I glance at them and look at them or whatever. And basically it states the date, customer identification number, a loan number and the amount of the payment, when it's past due. And normally look at the bottom dollar which as I stated previously, 2,200 or 370, whatever, 30 cents.

...

A.
I called S.B.A.

Q.
And who did you talk to?

A.
I don't recall who I talked to. I talked to several of them over there. When they wouldn't talk to me, I would talk to another.

Q.
What did you tell the S.B.A.?

A.
Oh, boy, I can't recall exactly.

Q.
Just if you can summarize it or tell us what you can recall.

A.
To the best of my knowledge, that I paid and I did what I was supposed to do, what the bank directed us to pay. And I didn't have no cause or distrust to check the bank. Why should I? We made an agreement and I felt that the bank would comply with it.

Q.
And what did you think that agreement said?

A.
Just that it stipulates in the note, tell me in writing when the interest rate went up or down in writing and to increase the payments to amortize the note as stated in the note.

Q.
And you understanding of amortizations is that it would be a zero balance at the last payment of that note of August, 1987; is that correct?

A.
None of the other notes had any less, no more.

...

Appendix EE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, PLAINTIFF	*	
VS.	*	
GULF COAST HELICOPTER, INC., EDWARD ACUNA, SR., AND MARGARET ACUNA, DEFENDANTS	*	No. H-88-2737
GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., AND MARGARET ACUNA, THIRD-PARTY PLAINTIFFS,	*	
VS.	*	
BAY AREA BANK & TRUST, THIRD-PARTY DEFENDANT.	*	

DEPOSITION OF MARGARET ACUNA

October 11, 1989 Houston, Texas

A Better Court Reporting Service, Inc.
David Beard*Gloria Phillips
Certified Short hand Reporters

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18902 Towns Road
Friendswood, Texas 77546
(409) 762-1474

. . .

Q.

. . . Did you pay any attention to that rate on the notices you got?

A.

Sir, I am not a banker, so I really didn't.

Q.

Would you notice from month to month if it had changed?

A.

Yes, I did that.

Q.

Can you tell me what the highest rate was that you noticed on the notice notice?

A.

I really don't recall.

Q.

When the interest rate changed and you noticed it, did you discuss that with your husband generally?

A.

No, sir.

Q.

Did you know that if the interest rate increased that the amount due on the note also would increase?

A.

I trusted my bank and I expected them to adjust the payment just like they do on our house.

. . .

(2) Working Capital Loans. Generally, loans for working capital should not exceed a 7-year maturity. However, this is not a hard and fast rule. While the maturity of each loan should be on a practical term in accordance with sould business proactice, it may be necessary to take advantage of the statutory 10-year maximum maturity when repayment ability presents a problem.

(3) Monthly Installments. Normally all loans (including EOL) shall be payable in equal monthly installments of interest and principal, except in connection with the following:

(a) Loans to borrowers whose income is received on an annual, semiannual, quarterly or seasonal basis;

(b) Constructing facilities loans (see sub-paragraph 32b(1)(b) above);

(c) Timber access road loans. (See Appendix 9.)

(d) Balloon payments but may be considered where unusual circumstances warrant their use. Balloon payments must be justified in the loan report and clearly identified in the loan authorization where they are used. [Emphasis added]

The following principles will be used to determine whether the use of a balloon payment is appropriate:

(i) The loan report must establish a reasonable expectation that the loan will be paid in full at the SBA maturity. Examples of this include the following:

(a) Where the receipts from the sale of property will be applied to the loan balance on or before maturity.

(2)

No. 91-1509

Supreme Court, U.S.
FILED
APR 13 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR. and MARGARET ACUNA,

Petitioners,

vs.

BAY AREA BANK & TRUST,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES M. JORDAN
Counsel of Record
BARLOW, TODD, JORDAN & OLIVER
Attorneys for Respondent
17225 El Camino Real
Suite 400
Houston, Texas 77058
(713) 483-8440

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QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Fifth Circuit properly upheld the District Court's grant of summary judgment in favor of respondent.

A. Whether there was a genuine issue of material fact regarding notice of interest rate changes.

B. Whether there was a genuine issue of material fact regarding amortization requirements.

II. Whether the grant of summary judgment in favor of respondent violated petitioners' due process or equal protection rights or the right to a jury trial.

III. Whether petitioner has standing to challenge, for the first time on appeal: (1) the District Court's grant of summary judgment in favor of respondent when it is alleged that respondent's motion for summary judgment did not address all of petitioners' causes of action; (2) the relevance of petitioners' Hispanic ancestry to a denial of the right to a jury trial; and/or (3) alleged violations of Code of Federal Regulations' provisions applicable to the Small Business Administration (SBA) in activities between the respondent and the SBA.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit are those in the caption and those listed by petitioners on page ii of their petition.

Bay Area Bank & Trust, filing this brief in opposition to the petition for a writ of certiorari, as respondent in this proceeding, states that this is its original designation of corporate relationships and that it has no parent companies, subsidiaries and/or affiliates which have issued stock to the public.

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III. Petitioner does not have standing to challenge, for the first time on appeal: (1) the District Court's grant of summary judgment in favor of respondent when it is alleged that respondent's motion for summary judgment did not address all of petitioners' causes of action; (2) the relevance of petitioners' Hispanic ancestry to a denial of the right to a jury trial; or (3) alleged violations of Code of Federal Regulations provisions applicable to the Small Business Administration (SBA) in activities between the bank and the SBA. 10

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No. 91-1509

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GULF COAST HELICOPTERS, INC, EDWARD ACUNA, SR. AND MARGARET ACUNA,

Petitioners,

vs.

BAY AREA BANK & TRUST,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent (the "Bank" herein) respectfully prays that the

petition for certiorari requested by petitioners (the "Borrowers" herein) for the review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on December 23, 1991, be denied.

OPINIONS BELOW

The opinion of the District Court (Petitioners' Appendix A) is unreported. The opinion of the Court of Appeals for the Fifth Circuit (Petitioners' Appendix B) is not to be published. This Court denied the petition for writ of certiorari in the companion case on January 7, 1992 (Petitioners' Appendix C).

STATEMENT OF JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Respondent does not disagree with petitioners' petition for writ of certiorari with respect to the Constitutional Provisions and Statutes.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the Court of Appeals for the Fifth Circuit (Petitioner's Appendix B, A-5, A-6).

SUMMARY OF ARGUMENT

In respondent's view, petitioners have misdescribed the Questions Presented for Review which actually arise on the record

of this proceeding; and, in part, it is because of such misdescription, that petitioners' argument fails to raise any issues warranting grant of certiorari. Certainly, petitioners have not claimed that the Court of Appeals decision in this case conflicts with a decision of this Court or of another United States Court of Appeals on the same matter. As can be seen below, no real constitutional question has been presented nor has the Court of Appeals decision ". . . so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1.

The only substantive issue before this Court is whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's grant of summary judgment in favor of respondent. The District Court properly decided, and the Court of Appeals correctly affirmed, that summary judgment was proper because there were no genuine issues of material fact with respect to: (1) whether the Bank's monthly note notices satisfied notice requirements and (2) whether the Bank was obligated to fully amortize the loan over the term of the note. All of the other issues of which petitioners complain are subsumed within the above; that is, whether petitioners were deprived of their rights to due process, to equal protection, and to jury trial simply because the District Court granted the Bank's motion for summary judgment.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY UPHELD THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

A. Notice of Interest Rates Was Given.

The petitioners (Borrowers) contend that the note was

ambiguous as to the notice required of interest rate changes. Borrowers also complain that the Bank did not send them proper notice of the quarterly rate changes. Because of these reasons, Borrowers say that the District Court erred in granting the Bank summary judgment, and the Court of Appeals for the Fifth Circuit erred in upholding the summary judgment.

The District Court never did find, nor was it asked to find, that the promissory note in this case was ambiguous. However, on appeal petitioners first complained that the note provisions regarding notice were ambiguous and, therefore, interpretation of the ambiguous provisions must be a question of fact which would prevent summary judgment. This contract arose in Texas and is not a federal contract. Therefore, Texas law, not federal law, controls questions involving the contract dispute. The notes upon which petitioners base their claim do not require constitutional interpretation and no federal question arises related to these notes (Petitioner's Appendix J at A-16, Petitioner's Appendix K at A-18).

The question of whether a contract is ambiguous is one of law. *R&P Enterprises v. La Guarta, Gavrel & Kirk,* 596 S.W.2d 517, 518 (Tex. 1980). The trial court has the responsibility of interpreting the language of an ambiguous contract as a matter of law. *Tower Contracting Co., Inc. v. Flores,* 302 S.W.2d 396 (Tex. 1957).

Petitioners admitted receiving notices each month, on or about the 10th day of the month, which indicated, among other things, the interest rate and the balance due on the note. (*See* Petition for Writ of Certiorari at 1-2, Petitioner's Appendix O at A-24, A-25). The record shows that the petitioners admitted receiving these notices, and admitted taking note of the interest rate changes (Petitioner's Appendix EE at A-75).

Petitioners argue that they are excused from paying the balance due on the note because the Bank failed to give rate change notices on a quarterly basis (which the Bank gave through the monthly note notices). Petitioners have tried to say that this rate change notice was a condition precedent to the Borrower's obligation to pay the balance due on the note. Even if no notice was given, the Bank argues that the language in the note concerning the Bank giving rate change notices is an independent promise and not a condition precedent.

A condition precedent which affects an obligation to perform is an act or event, occurring "subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty." *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976).

> While no particular words are necessary for the existence of a condition, such terms as "if", "provided that", "on condition that", or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties. *Id.*
>
> Where the parties' intent is doubtful or where the result is absurd or impossible, the contract will be interpreted as creating a promise rather than a condition. *Id.*

Conditions in contracts are not favored. A forfeiture as a result of a condition precedent is to be avoided when possible

under another reasonable reading. *See Willow Bend Nat'l Bank v. Commonwealth Mortgage Corp.*, 722 S.W.2d 12, 14 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). If a contract is capable of two constructions, one of which validates and the other of which invalidates the contract, a court must adopt the construction which validates the contract. *Harris v. Rowe,* 593 S.W.2d 303, 306 (Tex. 1979). A breach of an independent promise does not relieve the non-breaching party of the obligation to perform under the contract. *See Mitchell v. Rushing,* 55 Tex. Civ. App. 281, 118 S.W. 582, 585 (1909, no writ).

The note is clear. There is no conditional language. The note itself calls for the interest rate to increase regardless of notice. It does not say the Bank must give quarterly notice before the rate is increased. And even so, the Bank did give monthly notice of interest rates, which the Borrowers acknowledge seeing. There was no breach of any contractual provision. Therefore, petitioners' claims that a fact issue exists regarding the materiality of the alleged breach are irrelevant. Since there was no breach of contract, there can be no fact issue regarding materiality of a breach to preclude summary judgment.

Because of fluctuations in the interest rate charged, there was a balance due on the note when it matured. The Borrowers were notified of these interest rate changes and the balance due on the note by the medium of the note notices.

B. Amortization Was Not Required.

Petitioners argue that the Bank had to amortize this loan out over its seven year term. They based their argument upon only a single admission by the SBA that stated that "the loan was intended or required to be fully amortized during its seven year term." (Petitioner's Appendix L, at A-20). Petitioners throughout their petition try to use admissions by the SBA, in Appendices L, M, V, W, and X, against the Bank, which is prohibited by the Federal Rules of Evidence. Fed. R. Evid. 613(b).

The SBA did not require the Bank to vary the note payments so that the note was completely amortized at the end of seven years. The plain and unambiguous language of the note was that the Bank had the "right" to amortize the note, but not the obligation to do so. "Rights are defined generally as 'powers of freedom action.' " Black's Law Dictionary 1189 (5th Ed. 1979). This is the plain meaning of the word "right" and the District Court did not try to vary that meaning, instead giving the word the meaning it was intended, *Pagel v. Pumphrey,* 204 S.W.2d 58, 64 (Tex. Civ. App.-San Antonio 1947, writ ref'd n.r.e.).

The note itself even addressed the possibility of an additional payment in the end when it stated that payments would be made until paid provided that "all principal and interest not sooner paid shall . . ." be due at the end of the note's term (Petitioner's Appendix J, at A-16). By its own language, this note did not contain a balloon payment, as petitioner refers to, but rather the note merely contemplated an additional payment due at the end of the note's term due to interest rate fluctuations.

Nor would it have been particularly helpful to vary the note payments. As Mr. Acuna testified, level payments are easier to plan for and make it easier to operate his business.

The question of changing the installment payment is one of law to be decided by the District Court. *National Bank of Commerce of San Antonio v. United States,* 369 F. Supp. 990 (W.D. Tex. 1973), *aff'd mem.*, 491 F.2d 1271 (5th Cir. 1974).

Also please note, at page 13-14 of the petition, petitioners interpret *Sahadi v. Continental Illinois National Bank & Trust Co.*, 706 F.2d 193 (7th Cir. 1983). In the text interpreting this case, petitioners refer to the bank involved in *Sahadi* as "BANK," the same short form petitioner uses to refer to respondent throughout the petition, thus creating confusion as to whom petitioner is referring.

II.

THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT DID NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION RIGHTS OR THE RIGHT TO A JURY TRIAL.

Petitioners complain that they were deprived of their constitutional rights to due process, to equal protection and to a jury trial. This claim is solely based on the notion that any summary judgment deprives the losing party of constitutional rights. There is no question, however, that petitioners were given ample opportunity to present their case both to the District Court and to the Court of Appeals for the Fifth Circuit for consideration (Petitioner's Appendix AA, at A-46). Petitioners were represented in the proceedings below at all times including the hearing on the summary judgments, by lawyers. Petitioners do not deny this. Petitioners have not complained that they were not given an opportunity to respond to the Bank's motion for summary judgment, nor given an opportunity to be heard in open court; they were. They have not complained that they were not given an opportunity to appeal the grant of summary judgment against them; they were. Similarly, petitioners' contention at page 17 of the petition that the lower courts justified granting the summary judgment based on the District Court's backlog of cases is wholly unsupported.

There is nothing in the rules which states that the District Court must have a hearing on a motion for summary judgment (though it did) before it is disposed of. Fed. R. Civ. P. 56. The summary judgment motions could have disposed of on briefs. S.D. Tex. Loc. R. 6.

As long as petitioners were granted an opportunity to be heard on the motion for summary judgment through written response

or oral argument or both (as here), the granting of the summary judgment is not a denial of due process. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 863 (5th Cir. 1970).

If there are no genuine issues of material facts at issue, then there does not have to be a jury trial " . . . the right to a trial by jury does not prevent a court from granting summary judgment." *Plaisance v. Phelps*, 845 F.2d 107, 108 (5th Cir. 1988).

As a history of the case shows, the cause pending now before this Court is a companion case to one in which writ of certiorari was denied on January 27, 1992. In the petition for writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit upholding summary judgment in favor of the SBA, Cause No. 91-667, this Court had before it substantially the same issues which are raised by petitioners now in this petition. Respondent urges the Court to reject petitioners' arguments as it did in the companion case. Petitioners have not shown that they were denied due process, equal protection, or their right to a trial by jury. Manifestly, there is no important question of constitutional law requiring review by this Court.

III.

PETITIONER DOES NOT HAVE STANDING TO CHALLENGE, FOR THE FIRST TIME ON APPEAL: (1) THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHEN IT IS ALLEGED THAT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DID NOT ADDRESS ALL OF PETITIONERS' CAUSES OF ACTION; (2) THE RELEVANCE OF PETITIONERS' HISPANIC ANCESTRY TO A DENIAL OF THE RIGHT TO A JURY TRIAL; OR (3) ALLEGED VIOLATIONS OF CODE OF FEDERAL REGULATIONS PROVISIONS APPLICABLE TO THE SMALL BUSINESS ADMINISTRATION (SBA) IN ACTIVITIES BETWEEN THE BANK AND THE SBA.

In petitioners' Questions Presented for Review at page "i" of the petition, petitioners allude to one topic which is never even addressed in the petition itself, the relevance of petitioners' "Hispanic ancestry" to an alleged violation of the Seventh Amendment. In addition, petitioners also claim in the Questions Presented for Review, in the Statement of the Case, and in the Case History Factual that summary judgment was improper because respondent's motion for summary judgment did not address all of petitioners' causes of action and respondent only asked for partial summary judgment.

Respondent's motion for complete summary judgment addressed every cause of action raised in petitioners' pleadings. Petitioners' complaint seems to be that respondent did not address the supplemental issue which petitioners were permitted to add immediately prior to the summary judgment hearing which involved a separate loan and the land collateral thereon (Appendix A). However, respondent's second motion for summary judgment and brief in support thereof addressed every issue raised in petitioners' pleadings, including their supplemental pleadings

(Appendix B). The land lien issue was fully addressed during oral argument before the District Court. The District Court properly decided the land lien was not controlling, but out of an abundance of caution, the District Court had the Bank file its second summary judgment so as to include the issue on the land and its lien (Appendix B). He then promptly granted summary judgment as to all issues (Petitioner's Appendix A, at A-1). There is no support for petitioners' contention that respondent moved only for partial summary judgment.

The above described points are not adequately addressed in the body of the petition and therefore these issues are insufficient to warrant review by this Court. More importantly, however, these points are improperly being raised for the first time in the petition for writ of certiorari. Absent exceptional circumstances, this Court should decline to consider questions presented for the first time in the petition for certiorari that have not been considered by the trial or appellate courts below. *United States v. Lovasco,* 431 U.S. 783, 788 n.7, 97 S. Ct. 2044, 2048 n.7 (1977); *Patrick v. Burget,* 486 U.S. 94, 99 n.5, 108 S. Ct. 1658, 1662 n.5 (1988); and *Kosak v. United States,* 465 U.S. 848, 850 n.3, 104 S. Ct. 1519, 1521 n.3 (1984). Although petitioners were given every opportunity to raise all challenges to the District Court's ruling in their appeal to the Court of Appeals for the Fifth Circuit, no challenge has previously been made regarding any alleged failure of respondents to address all of petitioners' causes of action or to any claims regarding petitioners' Hispanic ancestry. This Court should decline to hear issues not presented to the Court of Appeals. *Kosak,* 465 U.S. at 850 n.3.

Petitioners demand certiorari because they claim the Bank violated provisions of the Code of Federal Regulations applicable to the Small Business Administration. As stated above, this Court has already denied certiorari in the companion case which involved the SBA and raised similar claims regarding C.F.R. violations.

These claims proved unsuccessful against the SBA so petitioners are now attempting them again, against the Bank. The case involving the SBA is over and the SBA has been paid in full for their damages. The C.F.R. provisions specifically apply to activities between the Bank and the SBA which did not involve the Borrowers. And in any event, the plain meaning of these regulations clearly do not support petitioners' interpretations.

Petitioners first claim a violation of 13 C.F.R. § 119.31(b) which reads "SBA shall not be obligated to purchase the guaranteed percentage unless SBA shall first determine that any failure by lender to provide timely and accurate quarterly status information caused no substantial harm to the Government." Obviously this provision has no effect on the Bank's rights to pursue payments under the note. This provision merely makes the SBA not obligated to purchase a note under certain circumstances. In this case, the SBA chose to purchase the note, regardless of whether it was obligated to do so or not.

Petitioners' next claim that the Bank violated 13 C.F.R. § 122.21 by allegedly failing to send the SBA notice of interest rate changes. Again, a violation of this provision has no effect on the Bank's rights to pursue full payment of the note. In addition, the provision conveys rights to the SBA, not to petitioners, which the SBA may enforce against the Bank. 13 C.F.R. § 140.1 regarding the collection of debts owed to the SBA states that the failure of the SBA to comply with any provision of the related regulations shall not be available as a defense to the debtor. This languate demonstrates that the C.F.R. provisions related to the SBA were not intended to be used by debtors. Similarly, petitioners have no standing to base complaints on violations of the SBA's Standard Operating Procedures. Petitioners' complaints regarding the SBA's failure to investigate the Bank's administration of the loan is irrelevant to this cause.

All complaints against the SBA have previously been denied certiorari review as referenced above.

Finally, all of the above contentions relating to violations of C.F.R.'s are improperly being raised for the first time in this appeal. Petitioners had every opportunity to have these claims heard in the lower courts but failed to bring them to the attention of the courts below. Therefore, these claims are improper basis for certiorari. *Kosak,* 465 U.S. at 850 n.3; *Lovasco,* 431 U.S. at 788 n.7; and *Patrick,* 486 U.S. at 99 n.5.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

CHARLES M. JORDAN
Counsel of Record
BARLOW, TODD, JORDAN & OLIVER
Attorneys for Respondent

APPENDIX A — MOTION TO ALLOW SUPPLEMENT TO THIRD-PARTY COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Defendants.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

MOTION TO ALLOW SUPPLEMENTAL
TO THIRD-PARTY COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Appendix A

Now Comes GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA, Defendants and Third-Plaintiffs and file this their request to the Court to allow supplementation to Third-Party Complaint and would show unto the Court as follows:

1. Supplementary discovery information was provided by BAY AREA BANK & TRUST on July 18, 1990 which allowed the necessary interest calculations to be made to determine the existence of an additional claim against BAY AREA BANK & TRUST.

2. Additional claims made in the "Supplement to Third-Party Complaint" simply conform the pleadings to the issues raised in BAY AREA BANK & TRUST's "Motion for Summary Judgment" and GULF COAST's "Response to Motion for Summary Judgment".

ATTEMPT TO CONFER

On August 9, 1990 Attorney for Defendants and Third-Party Plaintiffs conferred with William A. Wirth, Special Assistant U.S. Attorney who does not oppose the above Motion; Charles M. Jordan was on vacation on the date above indicated. Therefore, this matter is being presented to the Court for determination.

Respectfully submitted,

s/ R.L. Mays, Jr.
R.L. MAYS, JR.
8049 Midcrown Dr., #200
San Antonio, Texas 78218
(512) 657-7772
TBN: 13308200
SDN: 11606

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion to Allow Supplement to Third-Party Complaint was delivered in accordance with Fed. Rule of Civil Procedure 5 to: Mr. Charles Jordan, BARLOW, TODD, JORDAN & OLIVER, 17225 El Camino Real, Suite 400, Houston, Texas 77058 and by regular mail; postage prepaid to: Mr. William Allen Wirth, Special Assistant U.S. Attorney, P.O. Box 61129, Houston, Texas 77208 on this the 9th day of August, 1990.

s/ R.L. Mays, Jr.
R.L. MAYS, JR.

Appendix A

SUPPLEMENT TO GULF COAST HELICOPTERS, INC., ET. AL.'S THIRD PARTY COMPLAINT AGAINST BAY AREA BANK & TRUST

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Defendants.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

TO THE HONORABLE JUDGE LYNN N. HUGHES:

Appendix A

Third-Party Plaintiffs, GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA ("GULF COAST"), files this supplement to Gulf Coast Helicopters, Inc. et.al's Third Party Complaint Against Bay Area Bank & Trust pursuant to Fed. R. Civ. P., Rules 15b and 15d, and request the Court to allow Third-Party Plaintiffs to supplement their "Third-Party Complaint" and would show unto the Court as follows:

1. The general pleading information contained hereinbelow is simply to update the pleadings of Third-Party Plaintiffs and conform the pleadings to evidence. Specific information has been detailed in the "Response of Gulf Coast Helicopters, Inc., Edward Acuna, Sr., and Margaret Acuna to United States of America's Motion for Summary Judgment" ("GULF COAST'S RESPONSE"), as supplemented, filed previously herein, which is incorporated herein by reference for all purposes.

2. GULF COAST wishes to add an additional cause of action against Third-Party Defendant in accordance with information provided on July 18, 1990 as additional response to discovery by BAY AREA BANK & TRUST ("BABT") concerning Loan No. 5679. The interest rates provided by BABT demonstrates that GULF COAST was also overcharged on Loan No. 5679, more particularly described as a Promissory Note in the original principal amount of Seventy-Eight Thousand Dollars ($78,000.00) executed in Houston, Harris County, Texas on March 8, 1984. The interest rate information provided by Third-Party Defendant shows that Third-Party Defendant demanded and collected an excessive overcharge from Third-Party Plaintiffs in the approximate amount of Two Thousand Five Hundred Forty-Nine Dollars and 52/100 ($2,549.52).

Appendix A

3. Third-Party Plaintiffs allege usurious charges by BABT concerning the land loan (Loan No. 5679).

4. Third-Party Plaintiffs allege breach of contract by BABT concerning the land loan (Loan No. 5679).

5. Third-party Plaintiffs plead estoppel concerning the assertions of waiver by BABT.

6. Third-Party Plaintiffs plead waiver by BABT concerning its ability to collect any alleged deficiency concerning the One Hundred Fifty Thousand Dollars ($150,000.00) loan.

7. Third-Party Plaintiffs allege breach of fiduciary duty against BABT.

Respectfully submitted,

s/ R.L. Mays, Jr.
R.L. MAYS, JR.
8049 Midcrown Dr., #200
San Antonio, Texas 78218
(512) 657-7772
TBN: 13308200

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Supplement To Gulf Coast Helicopters, Inc. et.al's Third-Party Complaint Against Bay Area Bank & Trust was delivered in accordance with Fed. R. Civ. P. 5 to: Charles M. Jordan, BARLOW, TODD, JORDAN & OLIVER, 17225 El Camino Real, Suite 400, Houston, Texas 77058 and to Mr. William

Appendix A

A. Wirth, Special Asst. U.S. Attorney, P.O. Box 61129, Houston, Texas 77208 on this the 9th day of August, 1990.

s/ R.L. Mays, Jr.
R.L. MAYS, JR.

APPENDIX B — BAY AREA BANK & TRUST'S SECOND MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GULF COAST HELICOPTER, INC., ET AL,

Defendants.

GULF COAST HELICOPTERS, INC., ET AL,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

BAY AREA BANK & TRUST'S SECOND MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Third-Party Defendant, BAY AREA BANK & TRUST ("The

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Bank"), respectfully moves this Court to enter summary judgment in favor of Third-Party Defendant, and against Third-Party Plaintiffs, GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA, pursuant to Rule 56, F.R.C.P., on the ground that there is no genuine issue as to any material fact, and that Third-Party Defendant therefore is entitled to summary judgment as a matter of law.

In support of this motion Third-Party Defendant refers to the Memorandum, Affidavit, and Exhibits attached, and to the pleadings on file in this case. Further, Third-Party Defendant incorporates herein by reference for all purposes its "Motion for Summary Judgment" plus all exhibits attached thereto, regarding the $150,000.00 loan previously filed and granted herein.

WHEREFORE, PREMISES CONSIDERED, Third-Party Defendant moves this Court to enter summary judgment against the Third-Party Plaintiffs named above, that Third-Party Plaintiffs take nothing by this suit, and that Third-Party Defendant recover costs.

Respectfully submitted,

BY: s/ Charles M. Jordan
CHARLES M. JORDAN, P.C.
Admissions No. 3036
17225 El Camino Real
Suite 400
Houston, Texas 77058
(713) 488-8440
ATTORNEY IN CHARGE FOR
BAY
AREA BANK & TRUST

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OF COUNSEL:
BARLOW TODD JORDAN & OLIVER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Bay Area Bank & Trust's Motion for Summary Judgment has been forwarded to R. L. Mays, Jr., 8049 Midcrown, Suite 200, San Antonio, Texas 78218 and to William Allen Wirth, Special U.S. Attorney, 440 Louisiana, Suite 800, Houston, Texas 77208 via certified mail, return receipt requested, on this the 18th day of September, 1990.

s/ Charles M. Jordan
CHARLES M. JORDAN

WP/FILES/BABT-GCH.2SJ

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-88-2737

UNITED STATES OF AMERICA,

Plaintiff

vs.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Defendants.

GULF COAST HELICOPTERS, INC., EDWARD ACUNA, SR., and MARGARET ACUNA,

Third-Party Plaintiffs,

vs.

BAY AREA BANK & TRUST,

Third-Party Defendant.

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MEMORANDUM IN SUPPORT OF BAY AREA BANK & TRUST'S SECOND MOTION FOR SUMMARY JUDGMENT

COMES NOW, BAY AREA BANK & TRUST ("The Bank"), and files this its Memorandum in Support of its Motion for Summary Judgment.

STATEMENT OF FACT

1.

On or about March 8, 1984, Edward Acuna, Sr., as President of Gulf Coast Helicopters, Inc., executed and delivered a Promissory Note payable to the order of the Bank, in the original principal amount of $78,000.00 (the "land loan"). The Note and Deed of Trust are attached hereto as Exhibits "A" and "B" respectfully, and incorporated herein by reference.

2.

Interest on the land note was a variable rate equal to 3% per annum above the prime rate. Each change in the variable rate was effective, without notice, on the effective date of each change in the prime rate. Principal and interest were due in 60 monthly installments of $1,814.92, or more, payable on the 8th of every month. Third-Party Plaintiffs paid this Note off in November of 1988.

3.

Exactly one week before a hearing on the Motion for Summary Judgment of all parties, Third-Party Plaintiffs filed their Motion to Allow Supplementation to Third-Party Complaint, and

the Supplement thereto, attached hereto as Exhibits "C" and "D" respectfully and incorporated herein by reference. The Supplement contains new causes of action regarding the $150,000.00 Note, which is the subject of this lawsuit. The Supplement also contained three new causes of action regarding the above described $78,000.00 land loan, a transaction which is not a part of the present lawsuit and not related in any way. It is an entirely different Note, made at a different time, under different terms, and with different collateral. The Bank submits that these new claims regarding the land loan, being introduced at this late date, are very harmful and prejudicial to the Bank.

4.

At the hearing on August 17, 1990, the United States of America, Plaintiff, and the Bank, were both granted summary judgments on the entire action regarding the $150,000.00 Note. Third-Party Plaintiffs were not left with any causes of action against the Bank, except those raised in their Supplement. The Bank now requests this Court to grant it a Motion for Summary Judgment on the following causes of action raised by Third-Party Plaintiffs in their Supplement to their Third-Party Complaint.

USURY

5.

Third-Party Plaintiffs allege in their Supplement, that the Bank overcharged them $2,549.52 on the land loan, thus the interest charged was usurious. However, Third-Party Plaintiffs have produced no evidence that this Note is usurious, except a mechanical, number crunching exercise of what the straight amortization should be. See Defendants' and Third-Party

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Plaintiffs' Supplemental Production Response, the Amortization of Loan 5679, attached hereto as Exhibit "E", and incorporated herein by reference. As set forth in *Fears, Individually and as Officer and Director of Bill Fears Mobile Offices, Inc. v. Mechanical & Industrial Technicians, Inc.*, 654 S.W.2d 524 (Civ.App. - Tyler [12th Dist.] 1983, writ ref'd n.r.e.), the elements of a usury cause of action are: (1) loan, forbearance, or detention of money, express or implied; (2) absolute obligation or understanding that principal will be repaid; (3) be an understanding that interest in excess of that authorized by law is to be paid for the loan; and (4) an intention by the lender to extract usurious interest.

6.

The $150,000.00 Note is not on its face usurious, it does not call for an unlawful interest rate. Thus, it is Third-Party Plaintiff's obligation to establish that there was a corrupt agreement or scheme to recover usury and that such scheme was in full contemplation by the parties. *Richards v. Moody,* 422 S.W.2d 200, 202 (Tex.Civ.App. - Houston [14th Dist.] 1967, writ ref'd n.r.e.), *Wagner v. Austin Savings & Loan Association,* 525 S.W.2d 724, 727 (Tex.Civ.App. - Beaumont 1975, no writ). Third-Party Plaintiffs have not even suggested in their Third-Party Complaint or the Supplement thereto, or in any testimony, that there was a corrupt agreement, or that the Bank had an objective intent to recover usury, and that such agreement was in full contemplation of the Bank. Therefore, Third-Party Plaintiffs' usury cause of action must fail, because there was no understanding that the interest on the Note was in excess of that authorized by law. Nor was there an intention to extract usurious interest as established by the Affidavit of Harold Herman, attached hereto as Exhibit "F", and incorporated herein by reference.

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Further, this Affidavit establishes that the method Third-Party Plaintiffs used to compute the allegedly usurious interest is incorrect. It does not, as a matter of law, show an intent to charge interest in excess of that authorized by law. Therefore, Third-Party Plaintiffs cannot prove their usury cause of action, and the Bank is entitled to a summary judgment as a matter of law.

BREACH OF FIDUCIARY DUTY

7.

Third-Party Plaintiffs allege that the Bank breached its fiduciary duty. However, there is no authority in Texas which imposes the duty of good faith and fair dealing on lenders in general to their borrowers. *Nautical Landings Marina, Inc. v. First National Bank of Port Lavaca,* 791 S.W.2d 293, 299 (Tex.App. — Corpus Christi 1990). Generally, the duty of good faith and fair dealing does not exist in Texas unless created by either express contractual language or unless a special relationship of trust and confidence exists between the parties. *Nautical* at 299; *Arnold v. National County Mutual Fire Insurance Co.,* 725 S.W.2d 165, 167 (Tex. 1987).

8.

The Bank's Affidavit conclusively establishes the absence of a contractual agreement of good faith and fair dealing or a long standing special relationship between the parties. Therefore, the Bank had no fiduciary duty and it is entitled to a summary judgment as a matter of law on this cause of action.

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BREACH OF CONTRACT

9.

In their Supplement, Third-Party Plaintiffs allege breach of contract by BABT concerning the land loan. Third-Party Plaintiffs do not elaborate on this allegation. The Bank therefore must assume that Third-Party Plaintiffs mean that because the Bank allegedly charged usurious interest, the Bank breached its contract with Third-Party Plaintiffs. This cause of action, therefore, necessarily rests on whether or not the interest charged by the Bank was usurious. The Bank has in its previous section on usury established as a matter of law, that Third-Party Plaintiffs cannot prove the elements of usury. Further, the Bank has, in the Affidavit of Harold Herman, established that the interest charged on the land loan is not usurious. The Bank has fulfilled all of its obligations under the terms of the Note and the Deed of Trust, and therefore, there is no proof of Third-Party Plaintiffs' breach of contract cause of action, and the Bank is entitled to a summary judgment as a matter of law.

ESTOPPEL

10.

In their Supplement, Third-Party Plaintiffs plead estoppel concerning the assertions of waiver by the Bank. The Bank, again having to read between the lines, assumes that Third-Party Plaintiffs mean the Bank should be estopped from asserting its waiver defense by its alleged failure to give prime rate change notices and /or raise and lower their monthly payments, under the $150,000.00 loan.

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11.

The elements of estoppel are that there must have existed: (1) a false representation or concealment of material fact; (2) made with knowledge, actual or constructive, of those facts; (3) to a party without knowledge or the means of knowledge of those facts; (4) with the intention that it should be acted on; and (5) the party to whom it was made must have relied or acted on it to his prejudice. *Nelson v. Jordan,* 663 S.W.2d 82 (Tex.App. Austin 1983, writ ref'd n.r.e.). The basis of estoppel is deception and in its absence there can be no estoppel. *Kelly v. Heimer,* 312 S.W.2d 430 (Tex.Civ.App. — San Antonio 1958, writ ref'd n.r.e.). There is no evidence in this cause to support any element of equitable estoppel. The Bank did not make any false representations or concealments, with knowledge or not, to anyone involved in this lawsuit. No one involved in this lawsuit relied to their detriment or prejudice upon anything, said or done at any time by the Bank. Further, there is no evidence of any deception on the part of the Bank. Thus, there can be no equitable estoppel.

12.

Third-Party Plaintiffs testified that the Bank did not make any oral misrepresentations. They testified that they did not ask for any information, or help, they just read the $150,000.00 promissory note and signed it. (Dep. of Edward Acuna, Vol. II, p. 213, l. 19-23). Third-Party Plaintiffs knew that the interest rate was fluctuating, but did not do anything about this loan, because they were too busy and didn't pay any attention. (Dep. of Edward Acuna, Vol. I, p. 72, l. 23-25). Mr. Acuna testified that he was aware of the stipulations in the Note about notices, and that he would probably get an increase in payments when

the rates went up, but at the time business was good and he did not have a problem making the payments. (Dep. of Edward Acuna, Vol, I, p. 55, l. 25, and p. 56, l. 5). There is plenty of evidence that Third-Party Plaintiffs knew exactly what was happening with this loan. Everything about his loan was fully and equally open to Third-Party Plaintiffs for their inquiry and investigation. They admitted that they had all of the loan documents and they were given plenty of time to read them, and that they did review them before signing. (Dep. of Edward Acuna, Vol. I, p. 47, l. 14-19). Further, they have testified that the Bank always treated them correctly. (Dep. of Edward Acuna, Vol. I, p. 50, l. 1-9).

13.

Furthermore, this equitable estoppel cause of action is moot. The Court granted the Bank's Motion for Summary Judgment, which includes the Bank's waiver defense. The Bank argued and this Court agreed that even if Third-Party Plaintiffs could prove any of their causes of action regarding this $150,000.00 loan, Third-Party Plaintiffs had long since waived any right they might have had to sue the Bank. Therefore, the Bank is entitled to a summary judgment as a matter of law.

WAIVER

14.

In its Supplement, Third-Party Plaintiffs plead waiver by the Bank concerning its ability to collect any alleged deficiency on the $150,000.00 Note. The elements of waiver are:

(1) existing legal right, benefit or advantage, *Smith*

v. McKnight, 240 S.W.2d 368, 371 (Tex.Civ.App. — Amarillo 1951, no writ);

(2) knowledge of its existence, actual or constructive, *Loggins v. Gates,* 301 S.W.2d 525, 528 (Tex.Civ.App. — Waco 1950, writ ref'd n.r.e.); and

(3) actual intention to relinquish it or such conduct as will warrant an inference of the relinquishment of the rights in question, *Stowers v. Harper,* 376 S.W.2d 34, 39 (Tex.Civ. App. — Tyler 1964, writ ref'd n.r.e.).

The term waiver implies a choice or an election to dispense with something of value, or to forego some advantage that might have been demanded.

15.

Third-Party Plaintiffs fail to tell us what existing valuable, legal right the Bank possessed that it intentionally relinquished so as to waive its right to the deficiency left due and owing on the Note. Was it the Bank's right to raise and lower Third-Party Plaintiffs' monthly payments so as to amortize the Note? If so, the Note clearly says the Bank "may" raise or lower the monthly payments to fully amortize the loan within the loan term. This is not ambiguous. The Bank did not give up a valuable legal right when it chose not to raise and lower the payments. The Bank had the right *not* to change the payments as well. The Bank did not relinquish anything in this situation.

16.

If Third-Party Plaintiffs are referring to the Banks alleged

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failure to send prime rate changes notices, as relinquishing a right, the Bank sent monthly note notice for seven years, as has already been established. The Bank did not give up a right in this regard. Therefore, Third-Party Plaintiffs have failed to prove the elements of the cause of action of waiver, and the Bank is entitled to a summary judgment as a matter of law. Also, the Court has already ruled on the summary judgment as its relates to the $150,000.00 note.

17.

Because there is no genuine issue of any material fact in regard to Third-Party Plaintiffs' Supplement to its Complaint, the Bank is entitled to Judgment as a matter of law, and respectfully requests this Court to grant its Motion for Summary Judgment concerning the Supplement.

Respectfully submitted,

s/ Charles M. Jordan
Charles M. Jordan, P.C.
Admissions No. 3036
17225 El Camino Real
Suite 400
Houston, Texas 77058
(713) 488-8440
ATTORNEY-IN-CHARGE FOR
BAY AREA BANK & TRUST

OF COUNSEL:
BARLOW TODD JORDAN & OLIVER
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